

FEDERAL MINE SAFETY
AND
HEALTH REVIEW COMMISSION



MARCH 1984
Volume 6
No. 3

DECISIONS

COMMISSION DECISIONS

MARCH

The following case was Directed for Review during the month of March:

Kenneth Wiggins v. Eastern Associated Coal Corporation, Docket No. WEVA 82-300-D. (Judge Moore, February 16, 1984)

Review was Denied in the following case during the month of March:

Bobby Holt v. Southern Stone Company, Docket No. SE 83-49-DM. (Judge Broderick, February 17, 1984)

Request for Review was withdrawn in the following case during March:

Secretary of Labor, MSHA v. Mich Coal Company, Docket No. CENT 83-4. (Judge Kennedy, Interlocutory Review of January 30, 1984 Order)

MARCH 1984

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 7, 1984

JAMES ELDRIDGE

v.

SUNFIRE COAL COMPANY

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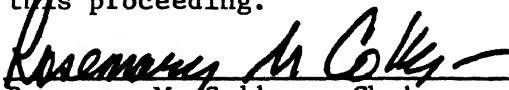
Docket No. KENT 82-41-D

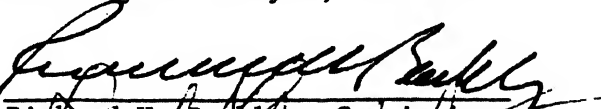
ORDER

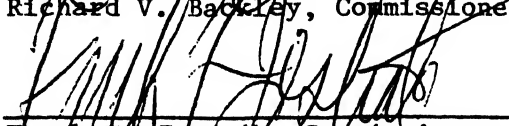
This discrimination case arises under section 105(c) of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq (1976 & Supp V 1981). The oral argument in this proceeding, originally scheduled for February 29, 1984, was postponed upon notification by the parties that they had agreed to settle the case and would file a motion to dismiss.

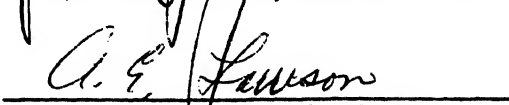
On February 24, 1984, the parties filed with the Commission a joint motion to withdraw their cross-petitions for discretionary review and to dismiss the case. In support of the motion, the parties attached a copy of their signed settlement agreement, dated February 21, 1984. The agreement, which is signed by the complaining miner, provides that Sunfire Coal Company will pay "as soon as possible" the sum of \$25,341 in back pay wages to the complaining miner and the sum of \$25,000 in attorneys' fees to the miner's attorneys.

In light of the parties' settlement agreement, we grant the parties' joint motion to withdraw their petitions for discretionary review. Payment of the sums specified in the settlement agreement shall be made within 30 days of issuance of this order. Accordingly, this case is dismissed. This is the final decision of the Commission in this proceeding.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank P. Jestrab, Commissioner


A. E. Lawson, Commissioner


L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 7, 1984

PATRICK J. MOONEY

v.

SOHIO WESTERN MINING COMPANY

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Docket No. CENT 81-157-DM

DECISION

This case involves a discrimination complaint brought by Patrick J. Mooney against Sohio Western Mining Company (Sohio) pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1976 & Supp. V 1981). At issue is whether Sohio's discharge of Mooney on September 9, 1980, violated section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1) (Supp V 1981). Following a hearing on the merits, the Commission's administrative law judge determined that Sohio did not violate section 105(c)(1) and dismissed Mooney's complaint. 4 FMSHRC 440 (March 1982) (ALJ). For the reasons that follow, we affirm the judge's decision.

Mooney was employed as an underground laborer by Sohio at its J.J. No. 1 uranium mine from February 5, 1980, until September 9, 1980, when he was discharged. During most of this period, however, Mooney was disabled and received worker's compensation as a result of a workplace injury that occurred on April 10, 1980. On that date Mooney was injured while he and his partner, Donald Benton, were standing in the elevated bucket of a front-end loader installing ground support. Mooney's left foot was broken when a slab of rock fell from the crown, that part of the drift where the rib meets the back. The rock fall and injury occurred in a large area that Sohio was excavating to serve as an underground maintenance shop. Earlier in the shift Mooney had refused an assignment requiring him to climb a ladder underneath a shale bulge in this area.

Mooney was unable to work as a result of his injury from April 10 until September 2, 1980, when he reported for duty. Mooney brought to the mine a statement from his doctor that he was ready for regular duty. In accordance with normal company practice, Mooney met with Sohio's safety director, Rudolph Siegmann, when he returned to duty. Mooney complained to Siegmann that accident reports filed concerning his injury

omitted the name of, or any information from, the other miner in the bucket when the injury occurred and failed to state that the area had not been properly supported. These omissions, in Mooney's view, denied him a 10 percent increase in worker's compensation benefits allegedly payable under the applicable state worker's compensation statute if an employer's failure to use safety equipment results in injury to an employee. Mooney informed Siegmann that he would pursue the matter further.

After this meeting Mooney was assigned to a surface job digging ditches, because he did not have safety glasses and could not go underground. The next morning Mooney called the mine to report that he would not be reporting for work because his foot hurt. Mooney made an unsuccessful attempt to see his doctor that day. The following day, September 4, 1980, Mooney returned to work and, because he did not have a note from his doctor, was given a warning and 3-day suspension. On two earlier occasions, February 28 and March 7, 1980, Mooney had presented a doctor's note after being absent from work for one day. He had also received a warning slip on April 3, 1980, for failing to furnish a doctor's note after being absent April 2nd. The warning Mooney received September 4th stated that a third warning would result in termination. Mooney's suspension period included a weekend, so that he next reported to work on September 9th. Mooney arrived 10 to 15 minutes late on that date, was given a third warning and was terminated.

On October 15, 1980, Mooney filed a written complaint of discrimination with the Department of Labor's Mine Safety and Health Administration (MSHA). See 30 U.S.C. § 815(c)(2). MSHA investigated the complaint but determined that Mooney had not been discriminated against in violation of the Mine Act. Proceeding pro se, Mooney thereafter filed a complaint with this independent Commission. 30 U.S.C. § 815(c)(3).

In his decision the Commission administrative law judge concluded that Sohio's discharge of Mooney did not violate section 105(c). The judge began his analysis by considering whether Mooney established his participation in protected activity. With regard to Mooney's allegation that on April 10, 1980, he had refused to climb a ladder under a shale bulge, the judge stated that this action "would be protected under the Act if it were shown that such refusal to work prompted his firing." 4 FMSHRC at 443. Concerning Mooney's complaints to the operator in September 1980 regarding the alleged filing of inaccurate accident reports, the judge stated: "If these complaints were motivated by a sincere belief by Mooney that such matters were related to safety and health conditions in the mine, it would constitute protected activity." 4 FMSHRC at 444. The judge found, however, that Mooney was concerned because he had not received an additional amount in workers' compensation payments that he believed he was due under state law, purportedly as a result of the operator's alleged filing of erroneous accident reports. According to the judge, because Mooney's complaints were "motivated by monetary reasons rather than safety and health", these complaints were not protected under the Mine Act. Id. The judge further found that Sohio had established that it had legitimate reasons for terminating Mooney based on violations of company policy concerning time and attendance.

On review, Mooney contends that the judge erred in concluding that illegal discrimination had not occurred. He argues first that the judge erred in determining that his complaints to the operator concerning the alleged filing of false accident reports were not protected because Mooney's motive for complaining was monetary. He maintains that he was injured in an accident occurring at Sohio's mine; the Act requires accurate reporting of such accidents; in his view Sohio did not accurately describe the accident in its reports; this alleged inaccurate reporting constitutes a violation of the Act; and, therefore, his complaints concerning this alleged violation were protected regardless of his personal motivation for making the complaints. Mooney's second argument is that the operator improperly determined that he had violated the company's time and attendance requirements, and, therefore, that he was "unjustly terminated." Mooney submits that under proper application of company attendance policies no cause for termination was present.

Although we agree with the administrative law judge's ultimate conclusion, we find it necessary to modify in certain aspects the rationale he utilized to support his conclusion.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complainant bears the burden of production and proof to show (1) that he engaged in protected activity and (2) that an adverse action against him was motivated in any part by the protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. The operator bears a burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion that illegal discrimination has occurred does not shift from the complainant. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC at 818 n. 20. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 76 L.Ed. 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) (approving the Commission's Pasula-Robinette test).

The judge's decision is unclear as to whether he concluded that Mooney established a prima facie case of unlawful discrimination. At the hearing, at the close of Mooney's presentation of his case-in-chief, the judge denied Sohio's motion to dismiss stating: "I feel that the complainant has made a prima facie case and that its [sic] up to respondent to rebut this." Tr. 107. In his final written decision, however, he found that Mooney had not established a prima facie case (4 FMSHRC at 446) while also concluding that Sohio had "successfully defended." 4 FMSHRC at 445.

Despite these conflicting findings, viewing them in context we are satisfied that the judge intended the following: As to Mooney's refusal to work under the shale bulge on April 10, 1980, the judge believed that Mooney had established the first element of a prima facie case, but not the second, i.e., the work refusal was protected but Mooney's discharge was not motivated by this incident. As to Mooney's complaints upon his return to work in September 1980 regarding Sohio's alleged filing of false accident reports, the judge believed that the first element of a prima facie case had not been established, i.e., he believed that Mooney's complaints did not constitute protected activity because they were motivated by monetary rather than safety and health concerns.

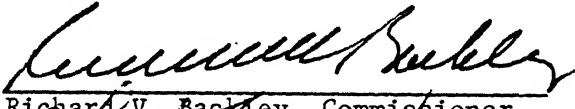
On review Mooney does not take issue with the judge's finding that the shale bulge incident did not motivate the operator in its discharge of Mooney. Therefore, we need not review this aspect of the judge's decision. 30 U.S.C. § 823(d)(2)(A)(iii). However, the judge inappropriately hinged his determination of whether Mooney engaged in any protected activity on whether an adverse action resulted. Protected activity under the Act does not gain or lose protected status dependent upon whether an adverse action resulted. We believe, however, that the judge was simply trying to state with regard to the incident in April 1980, that Mooney's work refusal did not motivate the operator to discharge him in September 1980. To this effect the judge stated that Mooney's "concerns in this matter were apparently accepted as valid and another employee was assigned to perform the task," and the "firing occurred approximately five months later and the ladder incident alone would seem rather remote." Id. 4 FMSHRC at 443.

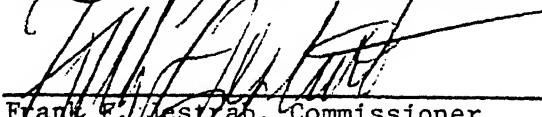
We also find it unnecessary to address whether the judge erred in determining that Mooney's complaints upon his return to work were not protected simply because of their monetary basis. Even if we assume arguendo that Mooney's complaints were protected by the Mine Act, we conclude that the record amply supports the judge's conclusion that Sohio, whether in rebuttal or defense, successfully overcame Mooney's case and established that it terminated Mooney for legitimate business reasons. In this regard, the judge made the following relevant findings of fact. On two occasions shortly after the start of his employment and prior to his injury, Mooney was absent from work for one day for medical reasons and upon his return to work on each occasion he provided a doctor's note. (Findings of Fact Nos. 3 and 4; 4 FMSHRC at 441). On a third occasion prior to his injury, Mooney was absent for one day due to illness, but failed to provide a doctor's note upon his return. Mooney was given a written warning for this failure. (Finding of Fact No. 5; Id.). The day after his return to work from disability Mooney was absent for one day for medical reasons, returned to work without a doctor's note, was given a second written warning and 3-day suspension, and was notified in writing that a third warning would result in termination. (Finding of Fact No. 13; 4 FMSHRC at 442). On the next day that he was scheduled to work, Mooney arrived late, was given a third warning and thus was terminated. (Finding of Fact No. 14; Id.).

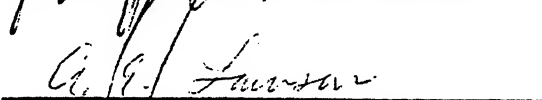
Under the Mine Act, an administrative law judge's findings of fact are to be affirmed if they are supported by substantial evidence. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The evidence supporting the above findings is not only substantial, it is largely uncontroverted. The judge further found that Sohio had established that it terminated Mooney for legitimate business reasons pertaining to Mooney's repeated violations of the operator's time and attendance policies; that Mooney was aware of these policies; and that the policies had been applied to Mooney consistently from the beginning of his employment and prior to his engaging in any protected activity. 4 FMSHRC at 444-45. Although Mooney argues for a different result and requests that contrary inferences be drawn from the circumstances surrounding his termination, on this record progressive discipline was established and we cannot say that the finding of the judge concerning the operator's motivation is not supported by substantial evidence or is otherwise contrary to law. 1/

Accordingly, the judge's decision finding that Sohio's discharge of Mooney did not violate section 105(c) of the Mine Act is affirmed insofar as it is consistent with this decision.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank F. Desjard, Commissioner


A. E. Lawson, Commissioner


L. Clair Nelson, Commissioner

1/ Our affirmance of the judge's conclusion that Mooney was discharged in conformity with company policy is not, as Mooney argues, inconsistent with a decision of an appeals referee of the State of New Mexico's Employment Security Department. Exh. C-4. In that decision, the appeals referee found that the written policy at the mine required a doctor's note after an absence of two days. That decision also indicated, however, that a different policy requiring a note for one day's absence pertained in Mooney's section. For purposes of awarding state unemployment compensation, the referee held that Sohio's written policy controlled, and, therefore, that Mooney had not been discharged for "misconduct" and was entitled to state unemployment benefits. The question presented under the Mine Act is not the same. Because the administrative law judge's conclusion that Mooney legitimately was discharged for violation of the mine operator's time and attendance policies, rather than for reasons protected by the Mine Act, is supported by substantial evidence, it must be affirmed.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 30, 1984

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
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on behalf of John Cooley	:	Docket No. LAKE 81-163-DM
	:	
v.	:	
	:	
OTTAWA SILICA COMPANY	:	

DECISION

This discrimination case arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and involves a miner's discharge for refusing to perform an allegedly dangerous task. The Commission's administrative law judge held that the miner's work refusal was protected and that his discharge by Ottawa Silica Company ("Ottawa") violated the Mine Act. The judge ordered reinstatement with back pay and benefits, without interest. The judge also denied, without prejudice, the Secretary of Labor's request for assessment of a civil penalty in this proceeding. 4 FMSHRC 1013 (June 1982)(ALJ). For the reasons that follow, we affirm the judge's finding of a violation and his severance of the civil penalty proceeding. However, we vacate the judge's back pay and benefits award and remand for a recomputation of the amount due the complainant.

Ottawa mines and processes silica sand at its Michigan Division Quarry, where the events at issue occurred. The operation involves the drying of wet sand in a large natural gas-fired dryer. The dryer has an electric spark plug that ignites the pilot light. The pilot ignites the flame of the main burner. These operations are usually performed from a control panel located approximately ten feet from the ignition area. At times, during 1979 and 1980, difficulties in lighting the dryer occurred when the electric spark plug failed to ignite the pilot light. On these occasions, the pilot was ignited manually.

Manual lighting required two people, one at the control panel and another who would hold a piece of burning paper to the pilot. To light the pilot a worker would climb eight feet above the floor to a metal walkway which surrounded the dryer. The pilot was 54 inches away from

the closest vantage point on the walkway. There was an opening between the pilot and this point on the walkway called a floor-hole, which was two feet wide. In order to reach the pilot a worker had to lean or climb over the guardrail on the walkway. Then, while reaching over the floor-hole, the worker would touch the burning paper to the pilot.

John Cooley, the complainant, had been employed by Ottawa as a laborer for eighteen months prior to his discharge in May 1980. During his employment with Ottawa, Cooley had a history of absenteeism, work refusals, and insubordination, and was nearing the conclusion of a one-year disciplinary probation when he was discharged. As noted above, at the time in question, the pilot light on the dryer did not always ignite automatically. When this occurred, a second worker, usually a laborer, was called to assist the dryer operator by igniting the pilot with burning paper. Cooley testified that he had been instructed in this method by two supervisors, including David Chalmers, his foreman at the time of his discharge. Cooley had been directed to ignite the pilot manually on over 30 occasions. Cooley testified that he complained throughout this period to his foreman, as well as to the dryer operators, that this was an unsafe procedure.

Cooley eventually bid on the job of dryer operator. When Cooley won the bid on the dryer, he was assigned a five-day training period in April 1980, with an experienced operator, Marvin Phelps. During his training the pilot had to be ignited manually on several occasions. Cooley was again assigned to light the pilot with burning paper, while Phelps worked the control panel. On every occasion Cooley complained to Phelps that the manual lighting procedure was unsafe.

On Friday, May 2, 1980, the last day of Cooley's five-day training period, the dryer was down when the shift started. Shortly before lunch, Cooley had to manually light the pilot. He testified that in doing so, he singed the hair on the knuckles of his right hand. He was very angry and wanted to confront management. He testified that he calmed himself down, realizing that he was on probation. He decided, however, that he would not manually light the pilot again. Under Ottawa's collective bargaining agreement with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Cooley was permitted to withdraw his bid during the training period. Because of his general dissatisfaction with the dryer operator's job, Cooley voluntarily withdrew his bid. Cooley so informed Chalmers, who agreed. Cooley told Chalmers he would return to working as a laborer after lunch.

Later that day, after having returned to his work as a laborer, Cooley was in the lunchroom when he received a telephone call from Chalmers, who told him to manually light the pilot on the dryer. Cooley testified that he immediately cursed. Cooley told Chalmers, however, that he was not cursing at him but that he would not light the pilot. He also said that if that were the proper way to light the pilot, the dryer would have been supplied with "a carton of matches and a bale of paper." Cooley reiterated this position in the face of renewed demands by Chalmers, who reminded him that he was still on probation. Chalmers then told Cooley to meet him at his office but Cooley replied that he would be in the lunchroom.

Chalmers met Cooley in the lunchroom and again ordered him to light the dryer manually. After a brief exchange, Chalmers stated that he did not want to hear Cooley's explanation and ordered Cooley off company property. Before leaving, Cooley met with his union steward, Kenneth Stumpmier, a former dryer operator. Cooley told Stumpmier that he was being sent home because of his refusal to light the pilot for safety reasons. Stumpmier attempted to talk to Chalmers about Cooley's work refusal after Cooley left but Chalmers refused to discuss the matter.

On Monday, May 5, 1980, Hilliard Bentgen, Ottawa's Industrial Relations Supervisor, discussed Cooley's behavior with Chalmers. Under Ottawa's personnel policies only Bentgen had authority to discharge an employee. Bentgen also met with Cooley and Stumpmier and discussed Cooley's safety concerns. In response to an inquiry by Bentgen, Stumpmier stated that he also would not light the pilot manually because it was unsafe to do so.

Bentgen discharged Cooley by letter dated May 6, 1980. The letter explained that Cooley was discharged because of his previous disciplinary problems, his refusal to follow the instructions of Chalmers, and his use of foul and abusive language in speaking with Chalmers.

In his decision, the Commission's administrative law judge concluded that Cooley engaged in a protected work refusal. The judge determined that Cooley had a good faith, reasonable belief that manually lighting the dryer was unsafe and exposed him to possible injury. The judge also found that the practice of lighting the pilot with a burning piece of paper was, in fact, unsafe. He rejected Ottawa's contention that Cooley communicated his safety concerns only after his refusal to work and concluded that Cooley had consistently complained that the procedure was unsafe. The judge noted that it was uncontested that Cooley's concerns were clearly expressed to Bentgen before Bentgen's decision to discharge. He held that the communication made by Cooley regarding his safety concerns fell within the test enunciated in Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982).

Finally, the judge rejected Ottawa's contention that Cooley was discharged because of his profanity toward his supervisor. First, he held that Cooley's use of profanity was part of the protected work refusal. Second, he held that the "[t]estimony and evidence adduced ... [did] not support a conclusion that the respondent would have fired Mr. Cooley for the manner in which he communicated his work refusal to his supervisor." 4 FMSHRC at 1048. The judge noted the absence of evidence that Cooley or any other employee had ever been disciplined for using profanity. He also noted testimony that Cooley's "cursing" was directed at the method of lighting the dryer, not at Chalmers, and that Ottawa's assertions that Cooley used "vile," "foul," and "abusive" language were based on Chalmers' report to Bentgen. Chalmers, who had been discharged for poor work performance, did not testify at the trial below. The judge, therefore, held that Cooley's discharge violated the Mine Act.

Under the analytical guidelines established in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Corp. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence that (1) he engaged in protected activity and (2) the adverse action against him was motivated in any part by that protected activity. If a prima facie case is established, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. See NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L.Ed.2d 667 (1983).

As explained in Robinette, a work refusal is protected under section 105(c) only when the miner has a good faith, reasonable belief in a hazardous condition. Good faith in this context simply means an honest belief that the hazard exists. Accompanying the good faith requirement is the additional requirement that the belief in a hazard be a reasonable one under the circumstances. Good faith and reasonableness may be determined by evaluating all the evidence for detail, inherent logic and overall credibility. Robinette, 3 FMSHRC at 807-12.

Ottawa challenges the judge's finding that Cooley had a reasonable belief that lighting the dryer manually was hazardous. Substantial evidence supports the judge's conclusion that Cooley's belief in this hazard was reasonable. The judge concluded that Cooley singed his hand and that this incident verified for Cooley his concerns over the manual lighting. The other dryer operators, while personally unconcerned with the danger, nonetheless respected Cooley's belief concerning the danger of the lighting procedure and did not find his reluctance unreasonable. Further, while there is no requirement that the reasonableness of Cooley's belief be verified objectively (Robinette, 3 FMSHRC at 811-12), the judge concluded that the practice was in fact unsafe, and substantial evidence supports that determination. We conclude that nothing in the record warrants reversal of the judge's conclusion that Cooley's belief in the hazard was reasonable.

Ottawa also challenges the judge's finding on good faith. Substantial evidence supports the judge's finding that Cooley acted in good faith. The judge acknowledged Cooley's troubled work history, short temper and lack of self-restraint, but found him to be a credible witness. 4 FMSHRC at 1045. The record is replete with references to Cooley's concerns over lighting the pilot manually, including complaints to Chalmers. It was the singeing of Cooley's hand that prompted him to vow not to perform the task again. In the final analysis, the judge's finding that Cooley possessed a good faith belief in the hazard is based essentially on credibility resolutions, and we discern nothing in the record warranting reversal of that resolution.

Ottawa also asserts that Cooley did not communicate the safety related basis for his work refusal to his employer on a timely basis, as required by Dunmire and Estle. While Dunmire and Estle states a preference for contemporaneous communication, it also contemplates a reasonable attempt to communicate even after the work refusal, if the circumstances so warrant. 4 FMSHRC at 133. Ottawa's position ignores the effect of Chalmers' actions. The testimony is uncontroverted that when Chalmers and Cooley met in the lunchroom, moments after Cooley's initial refusal over the telephone, Cooley attempted to raise the safety of the procedure as a concern. Chalmers refused to listen, saying "I don't care. I don't care. I don't care. I want you off the property." Tr. 31. Chalmers' refusal to consider the reason for Cooley's actions was compounded by Chalmers' subsequent refusal to discuss Cooley's safety concerns with Stumpmier, the union steward. With the contemporaneous attempts to communicate made futile, the discussion with Bentgen on Monday, May 5, was the first opportunity for Cooley to present his concerns clearly.

Ottawa has continually argued that Cooley concocted his safety concern over the weekend to save his job. However, the judge found that Cooley's history of complaints about the manual lighting procedure to his foreman and other dryer operators, including complaints during his training period, indicated a genuine and reasonable concern. The only evidence in the record to support a fabrication theory is the lapse of time over the weekend. We are persuaded that Cooley's previous statements, along with his inarticulate expressions of the basis for his refusal at that time, overcome the allegations of fabrication.

On the basis of the above, Cooley showed that he engaged in protected activity, the first element necessary to prove a prima facie case. As to the second element of a prima facie case, Ottawa does not contest that Cooley's discharge was motivated in part by Cooley's refusal to work. The discharge letter from Bentgen stated that Cooley was being discharged in part because he had refused to follow the instructions of his foreman. Therefore, the element of motivation was proved and Cooley established a prima facie case of discrimination.

Ottawa defended below and argues before us that Cooley's use of profanity toward his supervisor was a separable, unprotected action which would have resulted in Cooley's termination in any event, regardless of the work refusal. The Secretary of Labor argues that because the profanity was part of the communication of the refusal to work, it was part of the protected activity itself. The judge agreed with the Secretary's position, and found that the use of profanity during the telephone conversation in such a context was part of the protected work refusal. 4 FMSHRC 1047. We do not agree that the profanity was protected but we hold that Ottawa did not establish that it would have discharged Cooley for that reason alone.

The right to refuse to work is not explicit in the Mine Act. In Pasula, we found that right to exist on the basis of the entire statute, statements of legislative intent and legislative history. We did not discern then, and we do not now, any foundation for protection of profanity or other opprobrious conduct, whether occurring contemporaneously

with or subsequent to a refusal to work. See Robinette, 3 FMSHRC at 817, and Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983). Thus, because opprobrious conduct is not protected, the operator may show that such conduct motivated the adverse action, and that it would have taken such action against the miner in any event for that unprotected conduct alone.

The close nexus between Cooley's swearing and his work refusal complicates this case. Therefore, the "in any event" test may be best applied by envisioning Ottawa's response to the situation without a work refusal, i.e., did Ottawa prove that it would have discharged Cooley if the events had occurred exactly as they did, except that Cooley had proceeded to light the pilot?

Ottawa's discharge letter to Cooley clearly identified his use of profanity as one motivating factor in his discharge. Ottawa therefore showed that it was, in part, also concerned by Cooley's use of profanity. However, in order to prevail Ottawa must also prove the second element of its affirmative defense--that it would have taken adverse action against Cooley in any event for this unprotected activity alone. The judge concluded that Ottawa did not carry its burden. We agree and find that substantial evidence supports the judge's conclusion.

The record is clear that Cooley was less than an ideal employee. He had been discharged, reinstated on probationary status and suspended during that probationary period for insubordination. Bentgen testified that, given Cooley's record, Cooley would have been discharged for the use of profane language alone. However, there are countervailing factors on which the judge relied. Despite Cooley's disciplinary history, there is no evidence that Ottawa considered his difficulties to involve profanity. Further, there is no evidence that anyone had ever been disciplined by Ottawa for swearing or that the operator had a policy prohibiting swearing, either generally or at a supervisor.

In addition, by Cooley's own admission the swearing came first, yet Chalmers did not threaten discipline then. Only when Cooley refused to light the pilot did Chalmers threaten to discipline him. Three times Chalmers attempted to get compliance by reminding Cooley that he was on probation. If the swearing had been of significant concern, it is unlikely that Chalmers would have repeatedly requested that Cooley light the dryer. Immediately after the incident, Chalmers told Stumpmier that he had sent Cooley home because of his refusal to light the dryer and that this was the reason he would recommend Cooley's discharge. He never mentioned Cooley's profanity in this discussion.

We recognize that Cooley's previous discipline involved incidents of possible insubordination involving work refusals. At the time of the dryer pilot incident, Cooley had not yet completed his one-year probation and was clearly at risk for any future acts of insubordination. The judge could have concluded that Ottawa proved that Cooley's language was a separate and serious basis for discharge. However, the judge concluded:

After careful review of the record, I conclude and find that the testimony and evidence adduced in this case does not support a conclusion that the respondent would have fired Mr. Cooley for the manner in which he communicated his work refusal to his supervisor.

4 FMSHRC at 1048. We conclude that substantial evidence supports the judge's interpretation of the evidence and his rejection of Ottawa's position.

In conclusion, we find substantial evidence in the record to support the judge's conclusion that Cooley engaged in a protected work refusal and that his termination, based in part on that protected activity, violated section 105(c) of the Mine Act. Ottawa did not prove that it would have discharged Cooley in any event for his unprotected use of profanity and is therefore liable for its unlawful action. 1/

Issues remain concerning the judge's remedial order. The judge ordered Cooley reinstated with back pay but failed to award interest. The back pay award was based on data submitted by the Secretary, which utilized the dryer operator's rate of pay. Ottawa alleges that such calculations are in error because Cooley was a laborer at the time the discharge occurred. The Secretary argues that the award should have included interest.

The record reflects, and the judge held, that Ottawa discriminated against Cooley by discharging him. The Secretary's case did not involve allegations that Cooley's withdrawal of his bid for the operator's job resulted from discrimination. Cooley's testimony shows that he withdrew his bid for numerous reasons which did not involve the lighting procedure. Tr. 44-45, 64-65, Cooley Deposition 3-7. Cooley had voluntarily withdrawn his bid, without retaliation or conflict, before the incident that resulted in his illegal discharge. The record does not support a conclusion that the withdrawal of his bid in any way affected the events

1/ We note that Ottawa prohibited manual lighting of the dryer after the events in this case. It would thus appear that this dispute will not arise again.

leading up to or surrounding his discharge. Thus, Cooley had returned to his laborer's job when on May 2, as had happened in the past, he was again directed to manually light the dryer's pilot. Therefore, he should be reinstated to the position and pay rate he would have held but for the discrimination: that of laborer. Despite Ottawa's failure to respond to the judge's direction that the parties address remedy, ^{2/} it was error for the judge to fashion a remedy so clearly at odds with his findings and the evidence. Accordingly, we vacate the judge's award based on the dryer operator's pay rate and remand to the judge for the limited purpose of calculating a back pay award consistent with Cooley's status as a laborer at the time the unlawful discrimination occurred.

Further, we hold that, under the circumstances of this case, the judge erred in awarding to Cooley an increment of 52% of the back pay award to cover unspecified benefits. It is unlikely that Cooley would be made whole by receipt of a cash payment for loss of pension contributions. Retroactive payment to the appropriate fund, to insure that there is no break in service or related abrogation of pension rights that would have accrued but for the illegal discharge, would appear to be the appropriate remedy. See NLRB v. Strong, 393 U.S. 357, 358-60 & n. 4 (1968). Different treatment of health care benefits may also be required in order to make Cooley whole. Thus, on remand, the judge is to afford the parties an opportunity to present any argument and additional relevant evidence to insure that the remedy assumes a make-whole character.

The Secretary challenges the failure of the judge to award interest on the back pay. As we held recently, "Unless compelling reasons point to the contrary, the full measure of relief should be granted to a [discriminatee]. ... Included in that 'full measure of relief' is interest on an award of back pay." Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2049 (December 1983) (citations omitted). In Arkansas-Carbona, we established a formula for the computation of interest. In general, we contemplated only a prospective application of the Arkansas-Carbona interest formula. 5 FMSHRC at 2054. However, in this case, the judge failed to award any interest. This is inconsistent with the Mine Act because it penalizes Cooley without cause. Accordingly the case is remanded for computation of interest pursuant to the Commission's interest formula set forth in Arkansas-Carbona.

^{2/} Ottawa was ordered by the judge to address the appropriate back pay remedy in its post-trial brief. It failed to do so. A party is precluded by the terms of the Mine Act from raising issues on review that it did not raise below. 30 U.S.C. § 823(d)(2)(A)(iii) (Supp. V 1981). Were it not for the fact that, as discussed above, the utilization of the dryer operator's rate is totally without support in the record, Ottawa would be bound by the judge's award.

The final issue in this case is the Secretary's challenge to the judge's severance, without prejudice, of the civil penalty proceeding from the discrimination case. In Arkansas-Carbona we approved the judge's severing of the Secretary's proposal for civil penalty from the underlying discrimination proceeding because the proposal was vague and unsupported by information on the section 110(i) criteria for assessing a penalty. 30 U.S.C. § 820(i). We held in that case that the Secretary should henceforth include a penalty request in the discrimination complaint, supported by allegations concerning the appropriate factors sufficient to give the operator notice of the basis for the proposed penalty. 5 FMSRHC at 2044-48. We have since promulgated an interim procedural rule requiring this approach. Commission Interim Procedural Rule 42(b). 49 Fed. Reg. 5750 (1984) (to be codified at 29 C.F.R. 2700.42).

The present case was filed before the decision in Arkansas-Carbona and in many respects is similar to that case. The Secretary's complaint made only a naked request "for an order assessing an appropriate civil penalty against the respondent for violating section 105(c) of the Act." The only evidence specifically introduced by the Secretary on the penalty question was a computer printout of Ottawa's citation history and the size of Ottawa's Michigan division. Only in the Secretary's post-hearing brief was a dollar figure for the penalty proposed. These facts reveal even less notice to the operator concerning the penalty issue than was the case in Arkansas-Carbona. As we stated in affirming the judge's actions in that case:

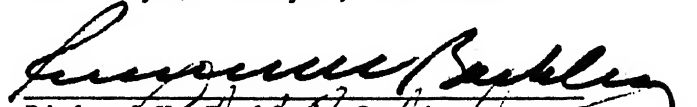
Because the Secretary did not provide in his complaint sufficient notice to the operator of the amount of the penalty sought and the basis therefor, we cannot say that the judge erred in severing the penalty proposal in order to provide such notice to the operator. Nor do we see the utility of a remand to allow the Secretary to amend his complaint. The judge's approach to the Secretary's inadequate proposal is consistent with the Act's notice requirement....

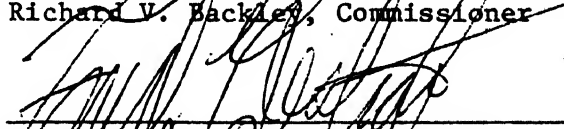
5 FMSHRC at 2048. There is no reason to take a different approach in this case and we therefore affirm the judge's severance of the civil penalty proceeding.

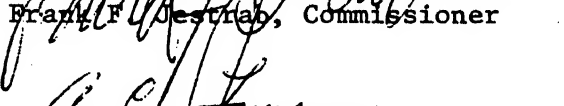
For the foregoing reasons, we affirm the judge's conclusion that Ottawa violated section 105(c)(1) of the Mine Act by discharging Cooley. Having so found, we order Cooley's immediate reinstatement to his position of laborer if such action has not been previously taken. We vacate the judge's award of back pay at the dryer operator's


rate and remand for recomputation of back pay at the laborer's rate with reconsideration of the treatment of fringe benefits. The judge shall award interest under the principles and methodology of Arkansas-Carbona. Lastly, we affirm the judge's severance of the request for a civil penalty from the merits of the discrimination case. 3/


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank F. Jestrab, Commissioner


A. E. Lawson, Commissioner


L. Clair Nelson, Commissioner

3/ Ottawa has challenged the Commission's jurisdiction in this case, citing as its basis for this argument the enactment of H.R.J. Res. 370, Pub. L. No. 91-92, § 131, 95 Stat. 1183, 1199 (1981), during the hearing in this case. This enactment was a Continuing Resolution on appropriations, which included a prohibition against expenditures by the Department of Labor's Mine Safety and Health Administration ("MSHA") to enforce the Mine Act in sand, gravel, and crushed stone mining operations. That prohibition only affected MSHA's funding. The Commission is a separate and independent federal agency, not connected to or part of the Department of Labor. At the time of the Resolution's passage, this case had already been filed with the Commission and the Commission had independent authority to resolve the issues. See generally Climax Molybdenum Co. v. MSHA and OCAW, 2 FMSHRC 2748, 2750 (October 1980), aff'd sub nom. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447 (10th Cir. 1983). (In July 1982, subsequent to the hearing in this case, H.R.J. Res. 370 was superseded, and MSHA's previous enforcement authority over sand, gravel, and crushed stone operations was re-established.)

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 1 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 83-277
Petitioner	:	A.C. No. 46-02166-03517-A
	:	
v.	:	Beckley No. 1 Mine
	:	
ROBERT G. MILLER,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

The parties have moved for approval of settlement by payment of the civil penalty (\$750) proposed in the petition. Grounds for the motion may be summarized as follows:

1. This is a civil penalty proceeding brought under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c), against Respondent as an individual agent of Ranger Fuel Corporation, the operator of the Beckley No. 1 coal mine located in Bolt, Raleigh County, West Virginia. On the date in question, February 10, 1982, Respondent was acting as general labor foreman at said mine.

2. On February 10, 1982, MSHA issued Citation No. 1061681 under section 104(a) of the Act to Ranger Fuel Corporation, citing a violation of a mandatory safety standard, 30 CFR §48.7(c), as follows:

It was revealed during a fatal track haulage accident that Bob Miller, foreman, assigned William Hall, Jr., a general inside laborer, to assist Lee Hackworth, mine locomotive operator, in moving a piece of mining equipment (longwall roof support jack) from the end of the (013) longwall section mine track to the mouth of the section, a distance of about 2,000 feet. The roof support jack was being pulled by a mine locomotive on which Hall was assigned to ride. Hall was not given instructions in the health and safety aspects and safe work procedures related to the assigned task prior to performing such task. The investigation revealed that Hall had not performed this task or demonstrated safe work procedures for such task within the last 12 months. An examination of the training records revealed Hall had not been trained in such task.

3. On June 28, 1983, the corporate mine operator, Ranger Fuel Corporation, paid an uncontested civil penalty assessment of \$2,000.00 for the foregoing violation under MSHA Assessment Office Case No. 46-02166-03514.

4. On August 30, 1982, pursuant to 30 CFR Part 100, a proposed civil penalty assessment of \$750.00 was issued by the MSHA Assessment Office to Respondent under A.O. Case No. 46-02166-03517-A for knowingly authorizing, ordering, or carrying out the foregoing violation as an agent of the corporate mine operator under section 110(c) of the Act.

5. On September 19, 1983, Respondent filed a notice of contest of said proposed assessment, resulting in this proceeding. However, Respondent now no longer wishes to contest the subject case and has tendered a check in the amount of \$750.00 in full payment and settlement of the proposed civil penalty assessment and as a plea of no contest entered herein for the purposes of this proceeding under this Act only, and not as an admission in any other proceeding.

I find that the motion for settlement is consistent with the statutory criteria for civil penalties. Accordingly, the motion is GRANTED.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above approved civil penalty of \$750.00 and upon such payment this proceeding is DISMISSED.


William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

MAR 6 1984

THE HELEN MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 83-200-R
v.	:	Citation No. 2111715; 5/25/83
	:	
SECRETARY OF LABOR,	:	Docket No. PENN 83-201-R
MINE SAFETY AND HEALTH	:	Citation No. 2111718; 6/1/83
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. PENN 83-202-R
	:	Order No. 2111719; 6/1/83
	:	
	:	Docket No. PENN 83-203-R
	:	Order No. 2111720; 6/1/83
	:	
	:	Homer City Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 83-232
Petitioner	:	A.C. No. 36-00926-03532
	:	
v.	:	Homer City Mine
	:	
	:	
HELEN MINING COMPANY,	:	
Respondent	:	

DECISIONS

Appearances: Thomas C. Means, Esq., Crowell & Moring,
Washington, D.C., for Contestant/Respondent;
Catherine O. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings were heard in Pittsburgh, Pennsylvania during the term November 8-9, 1983. The civil penalty docket concerns proposals for assessment of civil

penalties filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, seeking penalty assessments for four alleged violations of certain mandatory safety standards promulgated under the Act. The contests were filed by the contestant to challenge the legality of one citation and three orders issued pursuant to section 104(d)(1) of the Act.

Issues

The issues presented in Dockets PENN 83-200-R, 83-201-R, 83-202-R, and 83-203-R, are whether the conditions or practices cited by the inspector constituted violations of the cited mandatory safety standards, and whether or not the violations were "unwarrantable" and "significant and substantial."

Assuming that the fact of violation is established in each of the above dockets, the remaining Docket, PENN 83-232, concerns the appropriate civil penalties to be imposed for each of the violations after taking into account the requirements of Section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-165, 30 U.S.C. § 801 et seq.
2. Commission Rules, 29 CFR 2700.1 et seq.

Docket No. PENN 200-R

This docket concerns a Section 104(d)(1) Citation No. 2111715, issued by MSHA Inspector Lloyd D. Smith at 9:10 a.m., on May 25, 1983. He cited a violation of mandatory safety standard 30 CFR 75.1722(c), and the condition or practice is described as follows on the face of the citation:

A portion of the guarding provided at the 6 East Crossover belt drive on the clearance side was laying on the mine floor and the lower half of the fan blades on the drive motor were exposed because part of the protecting shroud had been broken off exposing the moving fan blades.

Inspector Smith found that the violation was "significant and substantial," and that the negligence by the mine operator was "High."

Inspector Smith fixed the termination date for the citation as May 25, 1983, 10:00 a.m., and he stated that it was terminated at 9:55 a.m. that day, and that "The guarding was put back in place securely."

Docket No. PENN 83-201-R

This docket concerns a Section 104(d)(1) Order No. 2111718, issued by MSHA Inspector Lloyd D. Smith on June 1, 1983. He cited a violation of mandatory safety standard 30 CFR 75.500(a), and the condition or practice is described as follows on the face of the order:

A nonpermissible switch box was being used to supply electric power to a water pump located in a working place, crosscut No. 8 to No. 9 room of the D-Butt, 040 Section. This violation occurred on a previous shift.

Inspector Smith noted that the violation was "significant and substantial," and he marked the appropriate negligence block on the citation form "Reckless Disregard." He also made reference to a previous section 104(d)(1) Citation No. 2111715, which he issued on May 25, 1983.

Docket No. PENN 83-202-R

This docket concerns a Section 104(d)(1) Order No. 2111719, issued by MSHA Inspector Lloyd D. Smith at 9:15 a.m., on June 1, 1983. Mr. Smith cited a violation of mandatory safety standard 30 CFR 75.200, and the condition or practice is described as follows on the face of the Order:

The approved roof control plan was not being complied with in the D-Butt 040 Section in that mining operations had been completed in a crosscut No. 8 to No. 9 room, the mining machine had been removed and warning signs had not been installed to warn persons that the mine roof was unsupported in this area. The violation occurred on a previous shift.

Inspector Smith did not find that the violation was "significant and substantial," but noted the negligence as "high" on the face of the order, that "the occurrence of the event against which the cited standard is directed was unlikely, and that any resulting injury would be "no lost workdays." As for the abatement of the cited condition, Mr. Smith noted that the order was terminated at 9:25 a.m., on June 1, 1983, and that "the warning signs were installed in the affected area."

This docket concerns a Section 104(d)(1) Order No. 2111720, issued by MSHA Inspector Lloyd D. Smith at 9:17 a.m., on June 1, 1983. Mr. Smith cited a violation of mandatory safety standard 30 CFR 75.200, and the condition or practice is described as follows on the face of the order:

It was evident that a person or persons had worked inby the permanent roof supports in a crosscut No. 8 to No. 9 room in the D-Butt, 040 Section in that a permissible type water pump had been installed 3 feet inby the last row of installed roof bolts and there were no temporary roof supports installed in this working place to permit the installation of the pump. This violation occurred on a previous shift.

Inspector Smith noted that the violation was "significant and substantial," and marked the appropriate negligence block on the citation form "High." He also made reference to his previous section 104(d)(1) Citation No. 2111715, which he issued on May 25, 1983.

Inspector Smith noted that Citation No. 2111720 was terminated on June 1, 1983, at 9:45 a.m. and that "The pump was removed by dragging it out with the discharge line cut power cable."

Stipulations

The parties stipulated to the following:

1. The Helen Mining Company owns and operates the Homer City Mine and both are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164 (Act).
2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 of the 1977 Act.
3. The subject Citation No. 2111715 and Order Nos. 2111718 and 2111720, were properly served by a duly authorized representative of the Secretary, Lloyd Smith.
4. Copies of Citation No. 2111715, Order No. 2111718 and Order No. 2111720 (attached to the Petition for

Assessment of Civil Penalty) are authentic copies of the original citations and orders.

4a. Copies of all documents offered and received by the parties as part of the hearing record in these proceedings are authentic copies of the original documents.

5. The assessment of a civil penalty in this proceeding will not affect the operator's ability to continue in business.

6. The computer printout reflecting the operator's history of violations is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.

7. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based on the fact that the Homer City Mine has an annual production of 1,043,911 tons and Helen Mining Company has an annual production of 13,414,096 tons.

8. The operator demonstrated a good faith effort to comply following issuance of Citation No. 2111715, Order No. 2111718 and Order No. 2111720 by taking immediate action to correct the cited conditions.

PENN 83-200-R, Citation No. 2111715

1. A guard was not securely in place over the lower portion of the fan blades on the drive motor of a conveyor belt while the belt was being operated, in violation of 30 CFR 75.1722(c), on May 25, 1983, at the 6 East crossover belt drive of the Homer City Mine.

2. The operator demonstrated ordinary negligence in failing to detect and correct the condition described in Citation No. 2111715.

3. If an injury were to occur as a result of the violation described in Citation No. 2111715, it would be a serious injury.

PENN 83-201-R, Order No. 2111715

1. A nonpermissible switch box, which is the subject of Order No. 2111718, was located in the working place, inby the last open crosscut, No. 8 to No. 9 room, 040 Section on June 1, 1983.

2. Two electrical power cables were connected to the subject nonpermissible switch box. One of these electrical cables was connected to a pump, the other cable extended a distance of approximately 300 feet from the connection at the switch box to the power center.

3. The power cable which led to the power center was not energized at the time Order No. 2111718 was issued.

4. The power cable which led from the switch box to the power center was not "tagged out" or labelled in any manner to indicate that it should not be energized.

Docket PENN 83-200

MSHA's testimony and evidence

MSHA Inspector Lloyd Smith testified as to his background and experience, and he confirmed that he inspected the mine on May 25, 1983, and issued a Section 104(d)(1) citation for a violation of mandatory standard 75.1722(c), (exhibit G-1). He stated that he issued the citation after observing that the belting used for guarding the belt conveyor drive was lying on the floor. The belt drive was operating at the time he observed the condition, and he confirmed that he observed the protective shroud used to guard the lower half of the drive motor was broken off (Tr. 9-14).

Inspector Smith identified exhibit J-2(a) as a photograph of the missing portion of the protective shroud used to guard the motor fan blades, and he identified exhibit J-2(d) as a photograph of the guarding which was off the equipment in question. He stated that he believed the violation to be "significant and substantial" because the protective belting which was lying on the floor was wet and slippery and if someone were to slip on it they would possibly fall into the unguarded opening on the metal motor fan blades (Tr. 18). He also considered the wet belting lying on the floor to be a tripping hazard (Tr. 19), and he confirmed that the person exposed to possible injury would be the preshift or belt examiner who walked the belt (Tr. 20). Inspector Smith indicated that abatement was achieved by installing a wooden support near the motor drive and nailing the belting back up (Tr. 21).

On cross-examination, Inspector Smith testified as to certain "cap lamps" which he observed at some distance in the No. 6 East Belt Haulage area, and he estimated that theythey were approximately 200 feet from the location of the unguarded drive motor (Tr. 24). He confirmed that the motor in question was partially guarded, and he indicated that his only concern was over the fact that the belt guarding normally used to guard the drive motor was lying on the floor (Tr. 27).

Mr. Smith conceded that production crews would not normally be in the area of the unguarded belt motor. He also conceded that a clearly defined walkway, with "very good clearance" was located adjacent to the unguarded motor area (Tr. 28). He also confirmed that there were no coal accumulations in the area around the motor in question (Tr. 33). Mr. Smith stated that a preshift belt examiner would have occasion to be in the area in question because he would place the time, date, and his initials on the belting to confirm that he had examined the area (Tr. 35).

In response to further questions, Mr. Smith testified that he observed footprints on the belting lying on the floor, and that this indicated to him that someone had walked across the belting while in that position (Tr. 37). He confirmed that the unguarded motor opening area which he was concerned about was approximately 26 inches, and he stated that he measured the distance and identified it on exhibit J-2 (Tr. 38-41).

In response to additional questions, Mr. Smith confirmed that he identified the miners who he previously observed by their "cap lamps," and that he did so after the citation was abated and terminated. He identified them as belt cleaners, and he confirmed that they informed him that they were unaware that the belt guarding was down and that they had not been in the area (Tr. 41). Mr. Smith also confirmed that while he waited around the unguarded motor area before issuing the citation, no one appeared to do any work in the area, and the last inspection entry made on the belt guarding was for the day shift on May 24, which was the 8:00 a.m. to 4:00 p.m. shift (Tr. 44). He contacted the section foreman who had made this entry, and he informed him that the belt guarding was intact when he inspected the area, and Mr. Smith had no reason to disbelieve him (Tr. 45).

In response to how long the belt in guarding was off the motor in question, Mr. Smith stated that he was informed by the safety committee that mine management was informed on May 20 that the belt guarding was off, and that the bottom

half of the protective motor shroud was missing (Tr. 47). He was also informed that a replacement for the broken shroud had been ordered, and that the belting guard was installed to keep people out of the area, and he explained the purpose of the belting as follows (Tr. 48-50):

JUDGE KOUTRAS: My question is, if the shroud were in one piece, and wasn't broken off at the bottom, would there be a need for this belt guarding?

THE WITNESS: Not in the location it's put there, no. There would be a need for guarding, but not where it is.

JUDGE KOUTRAS: You mean there would be a need for an additional guarding on the motor to protect the motor blades other than the shroud?

THE WITNESS: No, not the motor. The only guard on the motor would be over the coupler between the motor and the gear case drive. Maybe, if you let me walk over there, I can show you what I'm talking about.

JUDGE KOUTRAS: Sure. Go ahead.

THE WITNESS: If all of this shroud was intact, and there was no problem, then they would guard this area in here so a person would have no way to get in up in here. They would have to come around here. They would just guard this area right through here.

JUDGE KOUTRAS: But, what I'm saying is, you issued the Citation because the blades of the motor were exposed. Right?

THE WITNESS: Right.

JUDGE KOUTRAS: Well, if the shroud was intact, completely over the blades of the motor, what would that belt guarding on the side do?

THE WITNESS: What does this guard do? It prevents anybody from going in here, or slipping or falling in here, if that guard is up in place.

JUDGE KOUTRAS: Is that belt guard there to protect other areas of that belt, or is it there simply to protect someone from falling into the exposed lower half of the motor blades?

THE WITNESS: Well, I think it's in there for both in this particular case. It's in there for both reasons.

JUDGE KOUTRAS: Ms. Murphy, do you understand my question?

MS. MURPHY: I think I do, Your Honor.

JUDGE KOUTRAS: Is there an answer?

MS. MURPHY: Whether or not he would have cited it if the shroud was on there.

JUDGE KOUTRAS: That's right.

MS. MURPHY: I think what he just testified to, Your Honor, is that there are other things there that he believes people should be prohibited, or prevented from getting in to, and that the belt guard that was not in place served that dual function. If the shroud was on, there would still be a need for a guarding in a different location to prevent entry into the moving parts.

JUDGE KOUTRAS: My question, then, is, if the shroud were on, would we have this case. We might have had some other location as not guarded, but would we have an allegation that the fan blades on this motor, which were exposed, were not guarded? If that shroud were completely on, would he have issued a Citation on the fan blades of the motor?

MS. MURPHY: From what I understand about the case, it would not with respect to the exposed moving parts on this piece of equipment.

JUDGE KOUTRAS: My next question is; if the problem was caused by the bottom half of the shroud being broken off, and if that condition were there, why was the Citation abated by simply permitting them to put this belting up rather than making the Operator put that shroud back the way it was?

MS. MURPHY: The Operator had indicated to the Inspector that they had ordered a shroud, Judge, but, in the interim, I think --

JUDGE KOUTRAS: If I walked into this mine today, would I find a shroud or a belt?

MS. MURPHY: We don't know.

JUDGE KOUTRAS: Can somebody answer that question? Have you been back to this mine since May 25, of '83, back to this section?

THE WITNESS: I would have to look in my notes.

MR. MEANS: Your Honor, if I may explain.

JUDGE KOUTRAS: Yes, Mr. Means.

MR. MEANS: We may be able to get into some of this with my witness, Mr. Turner, but the shroud had broken when the device was being installed, I believe. The shroud had been ordered from the manufacturer. It's a special part you have to purchase from the manufacturer. And, in fact, one shroud had been delivered, and it was the wrong size and couldn't be installed, and so they had to order another one. In the meantime, they erected the belt guarding to preclude access to the area.

JUDGE KOUTRAS: Okay. Now, my next question, Mr. Means, if you know, is the shroud on that motor today?

MR. MEANS: I believe it is not.

JUDGE KOUTRAS: Or is it still on order?

MR. MEANS: I believe it is not on that motor right now. I believe it is still on order.

JUDGE KOUTRAS: It is not? And, the reason it is not on is because MSHA abated the Citation, and is permitting you to use this belting as an adequate guarding, for that broken shroud?

MR. MEANS: I don't know the answer to that.

Inspector Smith explained that his concern was over the fact that if the guarding were left on the floor, anyone walking by and slipping on the wet belt guarding lying on the floor could have caught in the exposed motor blades (Tr. 53). He believed that the support post used for nailing up the belt guarding had either fallen down or was removed sometime during the immediate two preceding work shifts on the afternoon of May 24 or the morning of May 25 (Tr. 56). He further explained his reasons for issuing the citation as follows (Tr. 58-59):

JUDGE KOUTRAS: Let me ask you this question. Assuming that that belt guarding were not in place at that location, and assuming that the shroud was completely on that motor again; assume this, the shroud was in place completely over the blades of the motor, and the belt guarding was not in place, would you still have issued the Citation?

THE WITNESS: Yes.

JUDGE KOUTRAS: And the reason for that is, in your opinion, the belt guarding was put there to keep people from getting to of that belt?

THE WITNESS: Right, to the drive rollers.

JUDGE KOUTRAS: To the drive rollers, yes. Would you characterize this belt guarding, more or less, as a physical barrier to alert people to stay out, or actually as a physical guard? I'm not trying to be technical, but, what if they had a fence out there, or a couple of posts running horizontally. Is that to keep people out of there, or is it to serve as a physical guard?

THE WITNESS: In this particular case, I think it's both. You see guarding in place. That kind of takes your eye. You see a barrier set up in front of you, guarding. It's like a barrier.

JUDGE KOUTRAS: You cited them, now, with a provision of the Standard that says that, "Except when testing, guards shall be securely in place while machinery is being operated." You saw no evidence of testing?

THE WITNESS: No, I didn't.

JUDGE KOUTRAS: Do you have any idea what the Company policy is with regard to doing maintenance on such equipment? In terms of locking out, and all that sort of business?

THE WITNESS: What I've seen during my inspections there, they do lock equipment out prior to working on it.

Helen Mining Company's testimony and evidence

David Turner, testified that he has been employed by the respondent as a dust sampler since 1979. He confirmed that Mr. Smith conducted an inspection on May 25, 1983, and that he issued the guarding citation in question (Tr. 62). Mr. Turner also confirmed that abatement was achieved by installing a post in place near the drive motor in question, and nailing the belt guarding on the post (Tr. 63). He stated that Mr. Smith told him that his concern was over someone possibly slipping and falling into the moving belt motor drive blades.

Mr. Turner stated that the walkway adjacent to the area which concerned Mr. Smith was traveled by belt examiners, cleaners, or maintenance personnel, and he confirmed that the walkway was about eight feet wide (Tr. 65). He stated that any belt work is done between shifts while the belt is down, and he explained the procedures for cleaning and maintaining the belt in question (Tr. 65-67). He confirmed that a footprint was present on the belt guarding which was down (Tr. 68). However, he believed that the motor housing itself served as a "natural barrier" to the motor. He confirmed that the belt guarding was installed to take the place of the broken motor shroud, and that this was done until such time as a new shroud which had been ordered could be used to replace the broken one (Tr. 69-70). He believed that anyone slipping in the area in front of the motor would have to make a concerted effort to reach the exposed motor blades (Tr. 70).

On cross-examination, Mr. Turner stated that the mine bottom in the area in question was wet and muddy, and that it was possible for someone to stick in the mud and lose their balance (Tr. 71). He generally described the equipment in the vicinity of the motor in question, and indicated that anyone using an oil fill-up on an adjacent motor would have to make a conscious effort to reach the cited location (Tr. 74). However, he conceded that someone standing immediately in front of the cited drive motor in question could reach in and contact the exposed blades, and that if he were to get himself between the guard and blades while standing at the perimeter of the motor housing, he could come in contact with the motor blades (Tr. 76).

Mr. Turner confirmed that after the citation was issued, he ascertained that the broken motor shroud had been in that condition for at least two weeks, and while no one brought this condition to his attention, he assumed that the mine safety committee called it to MSHA's attention (Tr. 79).

When asked to explain what Inspector Smith may have told him at the time he issued the citation, Mr. Turner stated as follows (Tr. 80-84):

JUDGE KOUTRAS: Did Mr. Smith explain to you why he considered the violation to be unwarrantable?

THE WITNESS: Yes.

JUDGE KOUTRAS: What did he tell you?

THE WITNESS: He said that a belt examiner, as part of his normal duties, in that area, should have seen the situation, determined that it needed corrected, and had it corrected. Something to that particular effect.

* * *

JUDGE KOUTRAS: But, in the two intervening shifts, someone was required to go there and make an examination.

THE WITNESS: Yes.

JUDGE KOUTRAS: My question is, did anyone, either Mr. Smith or you, or the Company, during the period after the Citation was issued, determine, number 1, whether someone went there, and if so, why they didn't take appropriate action to make sure that the guarding was put back up?

THE WITNESS: We did take action to try to pin that down.

JUDGE KOUTRAS: And what was the result of that action?

THE WITNESS: The result of that was that the two people in the two shifts making examinations prior to that could not remember if it was up or down. The person that was there on the third shift beforehand had seen it and said that it was up. And that's as close as we could pin it down.

JUDGE KOUTRAS: Now, if it were down, I assume that the belt examiner is required to make some entry in the book. Is he not?

THE WITNESS: What he will do -- , he would probably, if it took a post and resetting the post, he would probably do that himself. If he could not correct the situation, then he should put something in the book to that effect.

JUDGE KOUTRAS: It's obvious that nobody put the post up, or put the belting up, or you wouldn't have the citation.

THE WITNESS: Right.

JUDGE KOUTRAS: So, there's a strong inference that what? He either saw it up, or it mysteriously fell down during the time that he inspected it, or --?

THE WITNESS: It's one or the other.

* * *

JUDGE KOUTRAS: Did you determine whether or not any maintenance work was being done on this belt at any time during the intervening shifts prior to the time that the Inspector arrived?

THE WITNESS: No.

JUDGE KOUTRAS: Did you ascertain whether or not any testing was being done?

THE WITNESS: There was no testing being done during that 24 hour period.

MSHA's counsel conceded that if the motor blade protective shroud had not been broken in such a way as to expose as the bottom half of the motor blades, there would be no requirement for the belt guarding which was required to keep persons out of the area. Inspector Smith confirmed that he issued the citation for the exposed blades and nothing else (Tr. 87). He also confirmed that several days after the citation issued, the safety committee informed him that the broken shroud condition had previously been brought to mine management's attention, but that at the time of his unwarrantable failure finding he was not aware of that fact (Tr. 88). When asked to explain why he made an unwarrantable failure finding at the time he issued the citation, Mr. Smith explained as follows (Tr. 88-90):

Q. So that leads me to the next question. Why did you feel that this was an unwarrantable failure?

A. Because that's an area that should be included in the examination. Regulations require, on the belt haulage examinations, that dates, times and initials be placed in a sufficient number of places to indicate that the entire belt haulage has been examined.

Q. All right.

A. There were no dates, times and initials there for the two previous shifts. And, I stated earlier, I did talk to the day shift Foreman that did have a date up there the prior day. I stated his comments.

Q. Now, the Citation you issued was for failure to make the preshift examinations for the two shifts? Is that right?

A. No, I did not. The Citation I issued under 303(a)?

Q. Yes.

A. I cited, it was, the dates, times and initials were not evident to indicate that the area had been examined. There's no way I could say they did not examine it.

Q. All right. Well now, that's what I'm saying. That doesn't mean the same thing, does it?

A. No. I just cited them for not placing their dates, times and initials there to indicate they had been there.

Q. Now, if the place where the fellow would normally write that information was down on the ground, would he have a place to write it?

A. They were dating up right on the belt guarding. Primarily, right on the guarding between the two posts. That's where the previous day shift Foreman's date was.

Q. Did you ever determine whether or not the two fellows that are required to make the preshift actually made it?

A. Yes. I know that it was dated Fred Dobson. It was dated up FD along the belt haulage going back to 7 east and 1 butt, which 1 butt didn't have a belt drive at that time. He had his dates along that entire belt haulage.

Q. So, he did, in fact, make that particular location, the preshift?

A. At 7 east he was dated up, and at the belt tail he was dated up, or crossover belt, yes.

Q. Well, what I'm saying is, for the two previous shifts prior to your arrival, were you saying that they hadn't entered any dates or initials, and you issued Citations for not doing that, for not making that mechanical entry? Do you know whether they, in fact, inspected that area?

A. Mr. Dobson stated he did.

Q. He did. How about the other fellow?

A. I don't know. I haven't been able to determine who was required to make that on the 4 to 12 shift.

Dockets PENN 83-201-R and PENN 83-203-R

MSHA's testimony and evidence. PENN 83-201-R.

MSHA Inspector Lloyd Smith confirmed that he was at the mine in question on June 1, 1983, to conduct an inspection. Upon walking into the No. 8 room located in the no. 8 to no. 9 crosscut working place he observed a nonpermissible switchbox lying along the left rib. He described the switchbox in question and stated that it was being used to supply power to a submersible pump located in the no. 8 and no. 9 crosscut. The switchbox controlled the power from the box to the pump. A power cable ran from the box to the pump, and another power cable ran outby from the box towards the power center. The pump was approximately 20 to 25 feet from the box, and the pump was not running. The pump was located in water where the place had flooded out and the roof in that area was not supported. The power cable was not energized and the switch was off, and he estimated that the box cable was located approximately 300 to 400 feet from the power center. He estimated that the cable plug was approximately two to three feet from the power center. He identified exhibit G-3 as the section 104(d)(1) Order that he issued for the violation (Tr. 103-109).

Inspector Smith stated that his conclusion that the nonpermissible switchbox was being used to supply power to the pump was based on his observation of the pump, the flooded conditions, and a pump discharge line used to move the water. He also observed the power cable going to the power center, and since there was an obvious need for the pump in that working place, he concluded that the pump was used (Tr. 110).

After making his initial observations, Mr. Smith stated that he began walking down the entry toward the power center with day shift foreman Mitsko, but was interrupted when he encountered company safety Dale Montgomery, and Mr. Mitsko continued on to the power center. Mr. Mitsko came back and informed him that the cable plug was not plugged into the power center, but that it had not been "dangered off." Mr. Mitsko informed him that he had "dangered it off" or "tagged it" so that the plug could not be used (Tr. 111).

Mr. Smith gave the following explanation for the issuance of the order (Tr. 112-115):

Q. Inspector Smith, I want to ask you to assume, for a moment, that the pump was not energized on the previous shift. Would the conditions you observed in that area still constitute a violation of 75.500(a), in your opinion?

A. Yes.

Q. Can you tell the Judge why?

A. .500(a), a nonpermissible distribution box, or switchbox, whatever you want to call it, was used to make physical electrical connections. And, .500(a) prohibits making power connections with nonpermissible equipment.

JUDGE KOUTRAS: Well, as I read (a), it simply says that all junctional distributional boxes used for making multiple power connections in by the last open crosscut shall be permissible. That presupposes that it was used?

THE WITNESS: It was used to make those connections, yes.

JUDGE KOUTRAS: In other words, what you found, quite candidly and frankly, was a circumstantial case. Isn't that true? That you assumed there was a pump, there was a cable, and all this, and it was set up to pump water.

THE WITNESS: Right.

JUDGE KOUTRAS: How deep was the water?

THE WITNESS: I couldn't say, at the face.

JUDGE KOUTRAS: Everything that you saw led you to believe that that's what that pump was there for?

THE WITNESS: Right.

JUDGE KOUTRAS: So you came to the conclusion that it was used at some time to do what it was intended to do, that is, to pump the water out.

THE WITNESS: Correct.

Q. Inspector Smith, did the absence of the danger signs have any effect on your opinion that a violation of 75.500(a) would have still existed even if the pump wasn't energized?

A. No, it would still be the violation whether it was connected or not. It was used to make electrical connections in a working place. It was nonpermissible equipment.

JUDGE KOUTRAS: Wait a minute. Her question was, would the absence or the presence of the danger sign, or a tag, tagging had made any difference?

THE WITNESS: No. It would not. If it was dangered off at the power center, and that switch-box was where it was, it would still be a violation.

JUDGE KOUTRAS: On the theory that someone would disregard the danger sign and, possibly, come up and plug it in, and would use it? Or, that at one time it was used?

THE WITNESS: Well, no. Thinking that if the switchbox, itself, was lying there, no cables attached to it, nothing connected, I would say it would be no violation. A nonpermissible switchbox being there with cables connected to it, and connected to the circuit breaker within it, is a violation.

JUDGE KOUTRAS: Even though there's no power to it at the other end, from the power center?

THE WITNESS: Right. It was used to make connections.

JUDGE KOUTRAS: Okay.

BY MS. MURPHY:

Q. In your opinion, was the switchbox, or the box, available for use at the time that you cited the violation?

A. That was readily available for use.

Q. Why do you say that?

A. All they'd have to do is plug it in to the power center, go up there and turn the switch on, and run the pump. The discharge line was hooked up. Everything was there.

Mr. Smith stated that the presence of the nonpermissible pump posed a potential ignition explosion hazard because the mine liberates methane. He tested for methane in three places and found "three-tenths every place that I checked" (Tr. 117). He indicated that the mine is on a five-day spot inspection cycle because it liberates over a million cubic feet of methane in 24 hours. In the event of any interruption to the ventilation, the switchbox would be a potential ignition source, and since it appeared to him that the operator's intent was to use the pump, all that he had to do was to plug it in. In these circumstances, he believed that it was reasonably likely that an ignition would occur if the nonpermissible switchbox were to be filled with an explosive mixture of methane (Tr. 118).

Mr. Smith testified that the violation was "unwarrantable" because the preshift examiner had made an entry at the appropriate location in the area indicating the dates of his examination, and since the examiner would have been in the area where the pump was located he should have observed the violation (Tr. 119).

MSHA's Testimony and Evidence. PENN 83-200-R.

MSHA Inspector Lloyd Smith confirmed that he issued a second Section 104(d)(1) Order on June 1, 1983, charging a violation of mandatory safety standard section 75.200 (exhibit G-5). He stated that he issued the violation after

observing the water pump referred to earlier installed inby permanent roof supports. He identified a copy of the mine roof control plan (exhibit G-7), and he stated that the pump in question was approximately three feet inby the last row of roofbolts, and he measured this distance by means of a flexible tape ruler (Tr. 120-124).

Mr. Smith stated that there was a violation of "safety precaution" No. 4, pg. 5 of the roof control plan in that the installation of the pump was accomplished without installing temporary roof supports. He observed no one travel under any unsupported roof while he was at the scene, but the location of the pump as he observed it led him to conclude that someone had to take it inby permanent supports to place it where he observed it (Tr. 125). He confirmed that he observed no temporary supports inby the last row of roofbolts, and that while he was alone in the area at the initial observation of the pump, Mr. Mitsko came in and saw the condition and he informed him that he was issuing the order. He described the pump as approximately 24-30 inches high, and indicated that it had a power cable running to the switchbox, but that it was not energized (Tr. 126).

Mr. Smith stated that the violation was "significant and substantial" because a sudden collapse of a roof could occur at any time, and if that happened and someone were under unsupported roof a fatality could occur. Since he believed someone had been under unsupported roof to install the pump, and since most fatalities caused by roof falls occur within 25 feet of the face area, he believed it was "reasonably likely" that a fall could have occurred (Tr. 128). He did not know how long the unsupported roof condition existed, and he confirmed that he indicated on the face of his order that the pump had been "installed" because he observed it was placed "just right" so that the water discharge line was "pointing out of the place nice and straight" and that the power cable "was going straight over to it from the switchbox, like everything had been placed right there and lined up to get rid of the water from the pump with the hose" (Tr. 128).

Mr. Smith believed that the violation was an "unwarrantable failure" because the preshift mine examiner, who is also the section foreman, examined the place. Since he is in the area a minimum of two or three times a day, he should be aware of the fact that pumps are installed in his working section (Tr. 129).

On cross-examination, Mr. Smith confirmed that simply having a pump under unsupported roof is not a violation of section 75.200, and he confirmed that he saw no one under

unsupported roof and that no one ever has advised him that anyone walked under unsupported roof to place the pump where he found it (Tr. 130). Mr. Smith conceded that it was possible for someone to place the pump three feet in by the last row of roof bolts without going out under the unsupported roof, and he explained that someone could have "heaved it" out into the water (Tr. 131-132). He also confirmed that the most efficient use for the pump would have been to place it closer to the face where the water was the deepest. He said that the pump was not operating when he observed it, and his conclusion that someone had gone under unsupported roof was based solely on his observation of the pump in the location where he found it (Tr. 133).

Mr. Smith confirmed that at the time he issued the order he was convinced that the pump had in fact been used on the previous shift, and his assumption was based on the fact that water was present and the pump was attached to a nonpermissible switch "set up in a position in which it could have been used." He also confirmed that no one ever told him that the pump was used in that location or that anyone ever intended to use it at that location with a nonpermissible switch (Tr. 134).

Mr. Smith conceded that he subsequently became aware of the fact that the crew who worked the shift knew that the pump was not intended to be used until a permissible switchbox could be installed. He denied that at the time he issued the order that a permissible switchbox had been ordered to be brought in from the surface and that it in fact came in on the same mantrip which conveyed him to the section. He indicated that when he found the pump he did not know that it had been deenergized at the power center. He confirmed that the incoming foreman on the shift when the pump was found told him that he knew nothing about the pump or the switchbox, and although the order was issued at the beginning of the shift, the preshift examination had already been conducted. He did not examine the preshift books prior to issuing the order, but the section was reported "safe" before anyone went underground (Tr. 138-139).

In response to further questions, Mr. Smith stated that after the order was issued, mine management told him that the pump was thrown in by the roof supports. He estimated the weight of the pump at ninety pounds, but stated that he has never attempted to pick one up and swing it, and no one demonstrated the purported method of throwing it. He did say that the pump has handles and that someone explained that it was thrown and then stopped by means of jerking on the cable. He believed that this was a bad practice because the cable could be damaged. In his opinion, however, the pump was placed in the area where he found it, and he based this opinion on the fact that "everything was lined up" and the pump was not where the water would be over one's boots (Tr. 143).

Mr. Smith stated that the violation was abated by removing the pump from the location where he observed it and he confirmed that it was dragged out by means of the cable and then picked up by the handles (Tr. 144). The pump was removed so that the nonpermissible switchbox could be replaced (Tr. 145). Mr. Smith also confirmed that at the time he observed the pump, mining operations had been completed in that crosscut and all of the machines had been taken out. The pump was there just to pump water (Tr. 148). Mr. Smith further explained the term "installation" as follows (Tr. 148-149):

JUDGE KOUTRAS: This business of installing the pump, how long would it take to do the actual installation? I mean to put in the line that takes the water out, put the pump in and plug it up, get ready to go? Approximately.

THE WITNESS: Momentary. Exposure under unsupported roof, momentary. Just setp out there and set it down and stip back.

JUDGE KOUTRAS: So, the term "installation" and just placing it there are synonymous. Right? The term "installation" doesn't involve a whole lot of time, does it?

THE WITNESS: No. The discharge line would be attached to the pump before you put it in the water, and tighten the clamps up. Your power cable is already attached. You would just lift it up and step out there and set it down and step back out.

In response to certain bench questions concerning the general mine conditions where he issued the orders in these cases, Mr. Smith testified as follows (Tr. 148-160):

JUDGE KOUTRAS: Did you examine the roof conditions in that area where the pump was?

THE WITNESS: I did.

JUDGE KOUTRAS: And what did you find?

THE WITNESS: Good at that time.

JUDGE KOUTRAS: Roof conditions were fine?

THE WITNESS: Were good at that time. Good visually and sound.

* * *

JUDGE KOUTRAS: Now, since that area was mined out, would there have been any reason for any miners to be in there?

THE WITNESS: No.

JUDGE KOUTRAS: Other than, possibly, the fellow --

THE WITNESS: The mine examiner?

JUDGE KOUTRAS: -- that threw the pump, or placed the pump, or installed the pump?

THE WITNESS: No reason for anybody to be in there with the exception of the on-shift examiner and the preshift examiner.

* * *

JUDGE KOUTRAS: On the switchbox now. Did you make any determinations, or did you make any examination of the ventilation in that area?

THE WITNESS: The ventilation was adequate, over the switchbox and in the working place. Just like it's drawn there it was all intact.

JUDGE KOUTRAS: Okay. How were the roof conditions in there?

THE WITNESS: Good.

JUDGE KOUTRAS: Were people working in that section or in that room when you were there and found this Citation?

THE WITNESS: No. I was in there alone when I first went in there.

JUDGE KOUTRAS: Would mining have taken place in there?

THE WITNESS: Mining could not have taken place in there, no.

JUDGE KOUTRAS: Not at all?

THE WITNESS: Not until the roof was supported and the water pumped out. They would have to pump the water out, bolt the roof, and then they could mine it.

JUDGE KOUTRAS: They were working outby where those roof supports are. Right?

THE WITNESS: They were working over on the left. It's marked as #9 room, is where the machine would be working.

JUDGE KOUTRAS: Would they be working in the area where the pump switch was located? The nonpermissible pump switch.

THE WITNESS: No. I would see no occasion for them to work in there, other than to, perhaps, go in at a later time and move the pump in. That's the only reason I could see them going up in that crosscut to work. They'd have to go in there for examinations. To do other work, they wouldn't have any reason to go in there. They couldn't do any work.

JUDGE KOUTRAS: What is the significance of the three-tenths methane that you found?

THE WITNESS: Methane is being liberated on that working section.

JUDGE KOUTRAS: Well, how bad is three-tenths?

THE WITNESS: Three-tenths is bad. It's not bad as long as it's being diluted and moved.

JUDGE KOUTRAS: But was it being diluted and moved?

THE WITNESS: At that time it was, yes.

JUDGE KOUTRAS: Well now, if the methane was being diluted and moved, and there were no people working in there, and the ventilation was in good condition, if those were, in fact, the circumstances as you found them that day, you still maintain that it was significant and substantial?

THE WITNESS: I do.

JUDGE KOUTRAS: And that's based on the fact that what? That they had a nonpermissible pump in by the last open crosscut, and in the event the roof fell or they had some kind of emission in there that was the right mixture of air and methane, they could have had an explosion.

THE WITNESS: Based on the thinking that if you were to have an interruption of ventilation in that particular place. You see, what is not shown on that drawing, we talked a little when it was first put up, there are two ventilation controls that are not shown on that drawing right there. Where the arrow says, "to power center," you would have had a run through check curtain there used as a ventilation control. The pillar that the lift has been started in #7 to 8 room also has a canvas check curtain and line brattice installed as a ventilation control right next to the gob. Along that #7 room you've got your gob. You've got a fall there. You have an additional fall. Take that line brattice and check curtain down. Your air coming from 9 would go straight across. It would not go up in there where the pump switch is. It would short the air away from that, possibly.

JUDGE KOUTRAS: What led you to believe all those things would have happened?

THE WITNESS: The potential was there. That's a pillar section. They're retreating. That's a retreat section, pillar section.

JUDGE KOUTRAS: I get the impression that you found that it was significant and substantial because, if you hadn't done anything, once they started up, all these potentials could have come to pass, and they could have had some kind of an accident.

THE WITNESS: I felt the potential was there, being that close to the gob, workings.

* * *

JUDGE KOUTRAS: Did you have occasion to inspect any of those power cables, the one going to the power center, the one to the pump switch?

THE WITNESS: They were in good condition.

JUDGE KOUTRAS: You found nothing wrong with the cables insofar as any permissibility or anything like that? The cables were in good condition?

THE WITNESS: The cables were in good condition. The settings were proper for instantaneous trip at the breaker. We looked at that.

In response to further questions concerning his "unwarrantable failure" finding, Mr. Smith explained that it was his opinion that the section foreman should have been aware of what was going on in his section. When asked to explain why he attributed the violation to a "prior shift," he explained that when he issued the order he did not know who was responsible for the condition, but that he later ascertained that the shift immediately prior to the one when he found the pump had actually installed the pump. He identified this shift as the midnight to 8:00 a.m. shift on June 1, and that is when the actual violation took place (Tr. 153). When asked whether he had spoken to the previous shift foreman, he replied as follows (Tr. 153-154):

JUDGE KOUTRAS: Did you speak to the Foreman on that shift, the 12 to 8 shift, before you issued the Citation?

THE WITNESS: No. He was gone.

JUDGE KOUTRAS: He had left the mine completely?

THE WITNESS: At that time, yes.

JUDGE KOUTRAS: On a situation like this where you have some circumstantial evidence that may have occurred on the previous shift, would there have been anything to preclude you from waiting until you contacted that Foreman before you issued the Citation?

THE WITNESS: In this particular instance, with this particular violation, I would say "No." I think the facts were there. The pump was there. There were no temporary supports there. There were no warning signs there to indicate the unsupported roof.

JUDGE KOUTRAS: But the essence of the violation is, assuming all that's correct, what you just said, but the essence of the violation is that you presumed that someone had walked under unsupported roof to put the pump there.

THE WITNESS: Right.

JUDGE KOUTRAS: The only question I'm asking you is, isn't the most logical way to determine that fact to determine who was working on that shift, who was responsible for putting the pump there, and to contact those people before you issued the Citation?

THE WITNESS: We don't generally do it that way.

When asked to further explain his "significant and substantial" finding, Mr. Smith indicated that he was concerned about the "practice" of miners working under unsupported roof. However, he candidly conceded that he had no knowledge that the operator in this case had such a "practice," and he again reiterated his concern of a potential hazard, and while it may may have extreme he indicated that it "could happen" (Tr. 161-162).

Helen Mining Company's Testimony and Evidence

George Bondra, section foreman, testified as to his background and experience, and confirmed that he was the section foreman on the 12 midnight to 8:00 a.m. shift on June 1, 1983, and he confirmed that exhibit J-3 depicts the general area where he was working on that evening. He stated that his crew was mining coal and pumping water at the working face located at the 8 to 9 crosscuts. He identified exhibit C-1 as the notes which he made in his own handwriting that evening. He confirmed that a pump of the type shown in exhibits J-3(A) and (B) which was used during his shift at the crosscut of the 8 to 9 room where his crew was working. He stated that the pump was used at the beginning of the shift in the number 9 room, and that it had a permissible switch attached to it. He then stated that when the pump and switch were moved to the number 9 room, it was determined that the switch had a broken lead inside and that this caused it to malfunction, and could not be used. Since no permissible switch was available, a nonpermissible switch, which happened to be available, was used to run the pump. However, he insisted that the nonpermissible switch was placed outby the last open crosscut in the No. 9 room to pump water in that room, and he indicated where it was placed and used by making notations on exhibit J-3. He confirmed that the nonpermissible switch was placed on two posts with a rubber mat under it to insulate it from moisture and prevent electrocution (Tr. 166-173).

Mr. Bondra stated that the pumping of the water from the No. 9 room with the nonpermissible switch was completed at approximately 5:00 a.m., and the pump was not used in any other locations during his shift. The pump was taken out of the way to permit the mining machine to move through the area, and that "towards quitting time" he dragged the pump, with the nonpermissible switch still attached, and took it to the room where it was later found by the inspector. He explained that he took it there so that the incoming foreman would have a head start on pumping the water in the area, and he (Bondra) did not intend to use the pump to pump water in that area and he expected no one else to because the pump with the nonpermissible switch could not be used at the location where it was found by the inspector (Tr. 175). He confirmed that he did not replace the nonpermissible switch after leaving it at that location, but that he did order a new one and the order was placed when he first found that the permissible switch which had been on the pump had a broken wire. He identified exhibit C-2, as "a call our report" dated June 1 indicating a "breaker for a pump box was ordered," and he confirmed that the word "breaker" and "switch" means the same thing. He also indicated that the incoming foreman should have seen this report as this is part of the standard procedure (Tr. 177).

Mr. Bondra confirmed that he personally moved the pump and switch in question to its new location at the end of his shift and that he deenergized it before moving it by unplugging the cable from the power center and throwing the cable plug some 6 to 8 feet from the power center (Tr. 180). He stated that after moving the deenergized pump, he swung it out with his arms where it landed "just in by that last roofbolt" and he marked the location with an "x" mark on exhibit J-3. He denied that he went out under unsupported roof when he did this (Tr. 181). He stated that if the roof had been supported further, he would have put the pump in deeper water, but since the roof was not further supported he did not want to take the time to put up additional temporary roof support to do this because it was late in the day (Tr. 182). He confirmed that the permissible switch was not put on the pump because the one he had ordered did not arrive until the next shift, and he stated that he discussed this fact with the oncoming shift foreman Lee Mitsko. He stated that the discussion took place "outside, between the shift change," and that the conversation took place in the foreman's room. He stated that this was the usual procedure, and that he advised Mr. Mitsko that he should not use the pump until such time as the permissible switch was placed on it. Mr. Bondra stated that he did not believe that leaving the pump with the nonpermissible switch on it between shifts was not illegal because it was not plugged in or energized. He also believed that it would have been legal to change the switches at the place where he left it. (Tr. 184).

On cross-examination, Mr. Bondra stated that there was an unusual amount of water present in the section, that the pumps are used to pump water, and that he did not inquire as to the availability of a permissible switch on any other section because "the other sections probably wouldn't have one. There is no water in the other sections" (Tr. 186). He confirmed that while he could have taken the nonpermissible switch off the pump before leaving it where he did, he did not do so. He conceded that this may have made it easier for the next foreman to replace the nonpermissible switch with a permissible one, but he declined to do so because he is not a qualified mechanic. Even though a mechanic was present on his shift who could have done the work, he did not have him remove the nonpermissible switchbox (Tr. 187).

Mr. Bondra did not know whether the oncoming foreman actually reviewed his "call out report," and he confirmed that his signature is not on it. Since Mr. Bondra was not present on the ensuing shift, he did not know how the permissible switch was installed. He stated that he did not tag the plug out when he unplugged it from the power center, nor did he ask anyone else to do it, because he was called away to attend to a problem with the mining machine and "I let it slip my mind" (Tr. 189). Mr. Bondra stated that in addition to Mr. Mitsko, he also informed the section maintenance foreman Greg Furey about the need for a new permissible switch. Mr. Bondra also indicated that the "call out report" is initially made to Mr. Furey before he calls out to make his report (Tr. 189-190). He confirmed that his report to Mr. Furey and the "call out report" are two separate reports because he does not know if Mr. Furey actually makes a notation of the report made to him on the section (Tr. 190).

In response to further questions, Mr. Bondra stated that he first learned about the citation from his brother later on the evening of June 1, 1983, but did not contact Inspector Smith to explain the circumstance to him. However, he did contact Mr. Skvarch and discussed the circumstances with him (Tr. 193). Mr. Bondra also indicated that he did not tell oncoming shift foreman Mitsko that he had dragged the pump and switch up the entry and left it at the location where it was found by Inspector Smith because there was not enough time to discuss it with him between shifts. However, he did speak with him after the citation was issued and Mr. Mitsko told him that he "had been raked over the coals with the inspectors" (Tr. 197). When asked whether Inspector Smith was wrong in assuming that the pump and switch had been used, Mr. Bondra answered in the affirmative and he explained that such switches are normally hung up or placed

on insulated material if they are to be used. Since the switch in question was simply lying on the floor and was deenergized, Mr. Bondra was of the view that Mr. Smith should not have concluded that it was used (Tr. 198-201).

Larry Plovetsky, mine mechanic and certified electrician, testified that he has worked at the mine for over seven years and is a member of the UMWA. He confirmed that he worked the midnight to eight shift on June 1, 1983, and that George Bondra was in charge of the crew. He confirmed that the pump in question was first used in the cross of the 8 to 9 room and that it had a permissible switch on it. It was then moved into the no. 9 room and in the process of moving it it was damaged. He then installed a nonpermissible Westinghouse switch which was available on the section, and he informed Mr. Bondra that it could only be used outby the last open crosscut. The pump was then used, and the switch was outby (Tr. 206). At the end of the shift Mr. Bondra informed him that he had disconnected the power and moved the pump up into the crosscut of the 1 to 9 room so that the incoming shift could install a new permissible switch and start pumping the water out (Tr. 207).

Mr. Plovetsky stated that he first learned that the citation had issued when he returned to work on his next shift on the following day. The crew met with Mr. Skvarch, and he asked them if they would make statements as to what happened. He identified copies of certain undated statements that he and several of the crew members signed (exhibits C-3(a) through C-3(d)), (Tr. 208). He confirmed that he was present when they were signed by the crew, and he indicated this took place on June 2, 1983, at approximately 4:30 p.m. (Tr. 210).

Mr. Plovetsky confirmed that the power on the section was turned off when he left on the morning on June 1, 1983, at the end of the shift, and that he saw the cable plug from the pump and switch approximately 6 to 8 feet outby the power center (Tr. 212). He stated that during his shift on June 1, he saw the pump at the crosscut in question and that it was being used to pump water. However, when he arrived early on the shift the pump was off and he had to energize the section after it was preshifted by Mr. Bondra (Tr. 213).

On cross-examination, Mr. Plovetsky stated that he did not speak with any of the incoming crew on the 8:00 a.m. to 4:00 p.m. shift about the pump and switch in question, but that Mr. Bondra spoke with his boss about the fact that the pump could not be used inby, and that he did so when he called out for a new switch (Tr. 214). Mr. Plovetsky confirmed that he was qualified to remove the nonpermissible switch and replace it with a permissible one, but that this was not done (Tr. 214).

In response to further questions, Mr. Plovetsky stated that at the end of his shift on June 1, he locked out the plug on the power center which is used for the shuttle car, but since he had only one lock he could not lock out the power center plug used for the pump and it was not tagged (Tr. 216-217). When asked whether the inspector was wrong in assuming that the pump was used, Mr. Plovetsky answered as follows (Tr. 217):

JUDGE KOUTRAS: You heard me ask Mr. Bondra about Mr. Smith's observation when he came on this particular area. Do you have any comments on that? He assumed, seeing that thing lying there, that somebody was, either, using it or was going to use it.

THE WITNESS: Well, seeing it lying there, yes, I'd say you could assume that somebody was using it. But then, if you'd have gone back and seen how far that plug was thrown away from the power center, you'd think otherwise, too.

Dale Montgomery, respondent's assistant safety director, testified as to his background and experience, and he confirmed that he accompanied Inspector Smith and Mr. Smith's supervisor during the inspection on June 1, 1983. He confirmed that while he was "in the area," he was not present when Mr. Smith first observed the conditions which he cited (Tr. 220). He testified as to the normal mine procedure used for "call out reports," and he confirmed that it is normal practice for the outgoing and incoming foreman to meet and talk before the oncoming shift goes underground. He confirmed that he, Inspector Smith, and Inspector supervisor Bob Nelson rode the mantrip in together with the day crew on June 1, and he stated as follows with regard to the switchbox (Tr. 220-221):

Q. Other than the people you've indicated, was there anything else on the mantrip?

A. From what I learned later on, and from what I saw being carried to the section, there was a permissible type switchbox for a pump on the mantrip.

Q. So you saw it being carried to the section from the mantrip?

A. I saw it being carried to the section.

Q. Do you recall who was carrying it?

A. No, I do not.

Q. Do you know what the switch was for?

A. It's a typical pump switch. That's what it's used for. As far as I know, that's all it is used for, that type of a switch. Permissible type switch.

On cross-examination, Mr. Montgomery stated that he did not look at the "call out report" in question before going into the mine the day the citation was abated, and he did not know whether Mr. Mitsko had reviewed the report. He confirmed that the report does not state that a nonpermissible switchbox was located at the face or working place (Tr. 223).

In response to further questions, Mr. Montgomery confirmed that he was present when the nonpermissible switchbox was replaced with a permissible one. He indicated that the mantrip in question holds 18 men, and that he saw a permissible switch being carried from the mantrip to the section, and later found out that it was the same switch used to abate the citation. He believed that Inspector Nelson may have mentioned the fact that he saw the switch on the mantrip (Tr. 225). Mr. Montgomery did not know whether Inspector Smith saw the switch on the mantrip (Tr. 225).

Mr. Montgomery confirmed that he was not with Inspector Smith at the time he first observed the cited condition, but was with Mr. Nelson, and he explained what transpired as follows (Tr. 226-228):

JUDGE KOUTRAS: Where were you and Mr. Nelson?

THE WITNESS: We were in the crosscut. In the #8 room. Not the furthest one inby, the next one.

JUDGE KOUTRAS: And, when the mantrip stopped, and you all got off, you saw someone carrying a box?

THE WITNESS: Right.

JUDGE KOUTRAS: You didn't have the faintest idea what they were doing with that box at that time?

THE WITNESS: No.

JUDGE KOUTRAS: Sometime later in the morning, when you encountered Mr. Smith, he told you that he was issuing an Order and a Citation on

the nonpermissible switchbox, did lights start flashing all of a sudden? Did you say anything to Mr. Smith?

THE WITNESS: Well, he told me of what he was issuing. I, immediately, went up to the area and started drawing a diagram and looking around myself.

JUDGE KOUTRAS: But, I mean, did you know, at that point in time, that the switch that was on that very same mantrip was being brought in to -- ?

THE WITNESS: No, I didn't. I didn't realize it.

JUDGE KOUTRAS: Am I to assume that if the man that had the switchbox beat Mr. Smith to that location and made the switch with the proper switchbox, you wouldn't have got cited?

THE WITNESS: It's possible. If that's his order, yes. If he were to replace it before Mr. Smith would have got there.

JUDGE KOUTRAS: Now, when Mr. Smith issued the Order, and informed you for the first time that he was citing you for having this nonpermissible switch in that location, was there any discussion about the box that was taken off of the mantrip?

THE WITNESS: Not at that time, that I can remember, no.

JUDGE KOUTRAS: Okay. He issued his Order at 9:10, and, according to the Termination, it was terminated at 12:15, which would have been some three hours later. Right?

THE WITNESS: Right.

JUDGE KOUTRAS: When was the actual abatement done?

THE WITNESS: It was just finished just before 12:15.

JUDGE KOUTRAS: I mean, from the time that Mr. Smith informed you that there was a Citation and Order issued on that switchbox, when were the wheels put in motion to make the correction?

THE WITNESS: Immediately. But, we had a problem with that new switchbox also. We couldn't get it to seal, from what I understand. That's why it took so long.

JUDGE KOUTRAS: And were Mr. Smith and Mr. Nelson there during all this?

THE WITNESS: Yes.

JUDGE KOUTRAS: Did you explain to either one of them what the situation was?

THE WITNESS: No.

JUDGE KOUTRAS: Why not?

THE WITNESS: I didn't know.

Mr. Montgomery stated that he was not present when the pump was placed in by the roof supports, but observed it in that location and helped drag it out to abate the citation (Tr. 229).

Edward Skvarch, respondent's safety manager, testified as to his mining background, education, and job responsibilities, and he confirmed that he is aware of the orders which were issued on June 1, 1983, in these proceedings. He confirmed that he was present at a manager's conference concerning the orders, as well as a meeting at the mine concerning the "willful" aspects of those violations. The latter meeting was held on June 8, 1983, at the mine, and Inspectors Smith and Nelson, and foreman Lee Mitsko were among those present. The meeting was called to determine whether the nonpermissible switch order was a "possible willful violation," and he believed that Mr. Nelson requested the meeting to speak with Mr. Mitsko, and Mr. Skvarch identified the notes which he took at that meeting, (exhibit C-4; Tr. 245-248).

Mr. Skvarch testified that his notes of the June 8, meeting reflect that Mr. Mitsko was aware of the nonpermissible switchbox, and that he was aware of the fact that it had to be replaced (Tr. 249). Mr. Skvarch stated that he investigated the events of June 1, in connection with the issuance of the order, and that he did so in order "to determine whether there was unwarrantability on the part of the 12 to 8 shift foreman, George Bondra" (Tr. 250). His conclusions after investigation was that there was no "unwarrantability" on Mr. Bondra's part because the order stated that "a nonpermissible pump was used to pump water in the crosscut 8 to 9," when in fact his inquiry disclosed that the pump was not used to pump water (Tr. 251).

Mr. Skvarch stated in addition to Mr. Mitsko's statement that he was aware of the fact that the nonpermissible pump needed to be replaced, he also relied on a signed statement taken from mechanic Mark DeCarlo on the Wednesday before the hearing in this case, that Mr. Mitsko told him they had a switch to take the section, and that either Mr. DeCarlo or Mr. Mitsko placed it on the mantrip, and Mr. DeCarlo carried it to the section, (exhibit C-5; Tr. 252). Mr. Skvarch also alluded to information he received from production foreman Frank Hasychak indicating that he informed Mr. Mitsko that a nonpermissible switch was on the section and that he (Mitsko) "was to get it out" (Tr. 255).

Mr. Skvarch stated that as part of his investigation he asked Mr. Bondra to demonstrate how he threw the pump in question inby the last row of roof bolts, and that when he threw it 3 1/2 to 4 feet inby, "that proved to me that it was possible to do it" (Tr. 256). Mr. Skvarch was of the opinion that it was "highly unlikely, or a remote probability" that an accident could have occurred as a result of the cited switchbox, because a series of events, i.e., electric current, methane accumulation, would have to be present. In this case, however, the switch on the box was off, the switchbox and pump were not energized, and there was no accumulation of methane (Tr. 257).

On cross-examination, Mr. Skvarch confirmed that Mr. Bondra and Mr. DeCarlo were not present at the June 8, meeting with the MSHA Inspectors, and he conceded that it was possible that the meeting was called at the company's request, but that he was not aware that this was the case (Tr. 260).

Mr. Skvarch stated that while he was in the mine at the time the orders issued, he was not with Inspector Smith when he issued them. Although he spoke briefly with Mr. Mitsko at the time the nonpermissible switch was being replaced to abate the orders, Mr. Mitsko did not tell him that he knew the nonpermissible switch was there when he came into the mine (Tr. 267).

Mr. Skvarch testified that methane ignitions have occurred in the mine in question, but that these all occurred at the face on the mining cycle with the continuous mining machine, and no such ignitions have ever occurred with a nonpermissible pump switch (Tr. 271). He did not believe these face ignitions to be "unusual," and indicated that "it could occur with all due precautions taken. A face ignition could still occur in a mine that liberates methane" (Tr. 271). He conceded that the untagged plug could have been plugged in, and he explained why he did not believe the violation to be unwarrantable as follows (Tr. 272-273):

A. I base my opinion on unwarrantability on the basis of what was written on the Order. And that was that the pump was used, -- or, the switchbox was used to supply power to that pump. And, I'm saying, based on what was written on the Order, it isn't unwarrantable because that wasn't the fact. It was not used to supply power to that pump.

Q. So, in your opinion, in order for it to be unwarrantable, it would have had to have been used on the previous shift?

A. Or, possibly, the day shift.

Inspector Smith was called in rebuttal by MSHA, and he testified that when he first observed the cited conditions he was by himself, but that he encountered Mr. Mitsko later in the shift. After advising Mr. Mitsko that orders had been issued, Mr. Mitsko advised him that he had not been on the section since the previous Thursday, and when asked by Mr. Smith whether "his buddy" had told him about the conditions, Mr. Mitsko replied "no" (Tr. 288). Mr. Smith confirmed that he made some notes about the violations, but did not indicate whether they included the asserted conversation with Mr. Mitsko (Tr. 289). Mr. Smith also confirmed that he first saw the power center plug after the orders were issued and after Mr. Mitsko tagged it out (Tr. 289-290).

When asked to comment on Mr. Bondra's testimony regarding the use of the nonpermissible switch with the pump at another location in the section, Mr. Smith stated that had he observed this, he would have issued another order. He explained that the location of that nonpermissible switchbox as noted by Mr. Bondra, while outby the pump, was still within 150 feet of the working pillar, and this would be a violation of mandatory standard section 75.1000-1 or 1000-2 (Tr. 298-300).

Mr. Smith stated that after listening to Mr. Bondra's explanation as to how the nonpermissible switch and pump came to rest at the location where he found it at the time he issued the orders, he was of the opinion that the story was credible and that "it could have happened that way" (Tr. 304). Mr. Smith also stated that he would not have issued the citation for the pump being under unsupported roof if Mr. Bondra had demonstrated to him how he threw it out from under supported roof (Tr. 311-312).

Mr. Smith confirmed that he was at the June 8 meeting or conference referred to by Mr. Skvarch, and after reviewing a notation that Mr. Mitsko knew that he had to replace "a pump starter box," Mr. Smith could not recall Mr. Mitsko making that statement. Mr. Smith said that the only thing he recalled Mr. Mitsko saying at that meeting was that he did not know that a nonpermissible switchbox was in the working place (Tr. 307).

With regard to the switchbox being brought in on the mantrip, Mr. Smith stated that he did not see it, but was later told by Mr. Nelson that he had seen it on the mantrip. Although Mr. Nelson was on the section at the time the orders were issued, he was not with Mr. Smith when he observed the conditions which caused him to issue those orders (Tr. 308). He informed Mr. Nelson about the violations after starting to walk down the entry with Mr. Mitsko, but Mr. Nelson did not mention that he had seen the switchbox on the mantrip (Tr. 308). When asked what he would have done had Mr. Nelson mentioned it to him, Mr. Smith stated as follows (Tr. 308-309):

JUDGE KOUTRAS: Assuming that you had seen the switchbox on the mantrip, and assuming that that switchbox was, in fact, the one to replace the nonpermissible box that you found, would you still have issued the Order?

THE WITNESS: Yes, sir, I would.

JUDGE KOUTRAS: Why?

THE WITNESS: Like I said, the way the things -- . The facts that were there for me in the crosscut 8 to 9, in my mind, that pump was physically being used to pump water. There was nothing to prevent it from being used.

JUDGE KOUTRAS: So, what you're saying is that you came to the conclusion, through the circumstantial evidence that you found, that that pump was, in fact, used to pump that water out. And that the switchbox was part of the pump assembly for that purpose.

THE WITNESS: That's correct. I believed the pump was being used to pump water when I saw it, yes.

JUDGE KOUTRAS: Now, on the Citation for the pump being in by unsupported roof, of course,

at the time that you decided to issue the Order, the significant and substantial portion of it had long gone. Hadn't it? I mean, what was so significant and substantial about a pump just lying out there under unsupported roof?

THE WITNESS: The fact that I felt a person had, physically, gone beyond permanent supported room to place that pump in there.

JUDGE KOUTRAS: How was it reasonable and likely that, if nothing happened, that an injury would have occurred? If the unsupported roof was sound, and you sounded it, and visible inspected it, and the roof didn't fall, and nobody was hurt. Was it the practice that you were trying to address?

THE WITNESS: More or less, yes. In that particular case. The practice of going beyond permanent roof supports to do it. Both, in fact. The pump was physically there, in by permanent supports.

Robert G. Nelson, MSHA Supervisory Inspector, testified that he was at the mine on June 1, 1983, and that he went underground by means of an elevator and mantrip. He sat next to a mechanic, and Inspector Smith was at the front of the mantrip. Mr. Nelson stated that he observed a permissible switchbox which the mechanic had with him, and they generally discussed it. The mechanic advised him that he was taking the switchbox into the D Butt Section to replace one which had gone bad (Tr. 337).

Mr. Nelson stated that he went to D Butt Section after Mr. Smith's orders were issued, and that an hour or so later he discussed the matter with Mr. Mitsko. Mr. Mitsko advised him that he had not been on the section for a week, had no knowledge of the conditions cited, and that he was surprised about the orders which Mr. Smith had issued (Tr. 339).

Mr. Nelson confirmed that he was at the June 8th meeting at the mine, and he recalled asking Mr. Mitsko some questions, but not remember specifically what he asked. Although he didn't recall Mr. Mitsko stating that he knew he had to place the switchbox, Mr. Nelson stated that "he could have" (Tr. 341). Mr. Nelson denied that he called the meeting, when asked who did, he replied "nobody" (Tr. 341). He denied that he was at the mine for another reason, but someone advised him that Mr. Mitsko "had something to us" (Tr. 341).

On cross-examination, Mr. Nelson conceded that when he spoke to Mr. Mitsko the respondent had been charged with using a nonpermissible switch box to supply power in the cited crosscut (Tr. 344). He confirmed that the June 8th meeting at the mine resulted from an MSHA review of whether or not a "willful" Section 110(c) citation should be issued because of the nonpermissible switchbox situation. He also confirmed that he spoke with production foreman Hasychak, and that Mr. Hasychak expressed "surprise" over the presence of the nonpermissible switch, and indicated that he had no knowledge that it was used (Tr. 345).

In response to further questions from the bench, Mr. Nelson stated that the purpose of the June 8th meeting was to talk with the mine safety committee chairman, and that before making any decision he wanted "to make a good review" (Tr. 351). Mr. Nelson could not recall Mr. Mitsko stating that he had knowledge of the switchbox in question, but indicated that if he did he would not have given it much thought because of his prior statement on June 1 that he had no knowledge of it (Tr. 351). Mr. Nelson confirmed that he took no notes at the June 8 meeting, and the meeting was not taped or otherwise recorded. He explained that "I was not interested in the meeting" because he wanted to talk to the safety committee chairman, and he believed that the decision not to file a Section 110(c) citation may have already been made, and indicated that "we just wanted to make sure" (Tr. 353). Mr. Nelson stated that on June 8th, he met separately with the safety committee, but that they had no input and "didn't know very much about it" (Tr. 354).

Findings and Conclusions

Docket No. PENN 83-203-R

Fact of Violation

In this case, the inspector cited a violation of section 75.200, when he observed a permissible water pump located approximately three feet in by permanent roof supports. The cited standard provides in pertinent part that no person shall proceed beyond the last permanent support unless adequate temporary support is provided. The standard also requires a mine operator to comply with its approved roof control plan, and the inspector testified that the cited condition violated a safety precaution provision of the mine plan which contained language similar to that found in the standard.

At the time he observed the cited condition, the inspector saw no evidence of any temporary supports, and his order states that the violation occurred on the previous shift, and that it was evident that a person or persons had worked inby the permanent roof supports. The basis for his belief that someone had gone inby to perform some work was not only the fact that the pump was there, but that it had "been installed." He explained that water was in the area, the pump had been "set up to be used," and he candidly conceded that his citation was issued on the assumption that someone had gone beyond permanent supports on the previous shift, placed the pump where he observed it, and used it to pump water.

MSHA's counsel candidly recognizes the fact that the asserted violation is based on circumstantial evidence, and that the resolution of the matter depends on my assessment of the credibility of the witnesses. As correctly stated by counsel, the sole question is whether the section foreman's explanation for the presence of the pump inby supports is a believable one. In support of her position, counsel argues that the inspector testified that he never observed anyone throw such a pump into a flooded area and that such a practice subjects the equipment to strain which could result in damage to its internal connections.

The fact that the inspector never observed anyone throw a pump is irrelevant. In this case, the inspector conducted no experiment, did not attempt to pick up the pump, asked no one to demonstrate it for him, and he confirmed that he made no effort to contact anyone from the shift on which he believed the violation occurred because he did not believe it was necessary. It occurs to me that with a little more investigative effort, the inspector would have been in a better position to ascertain the facts. As for subjecting the pump to strain by throwing it, the pump was described as weighing 90 pounds, and I believe the word "heave" is a better description. Further, the testimony in this case is that the pump condition was abated by someone dragging it out from under unsupported roof by pulling on the power cable, and that this was done in the presence of an inspector. Since no one inspected the pump in question, and since it was permissible, there is no evidence that the pump was damaged, and the practice of pulling it out by the cable is more likely to place a strain on the connectors.

MSHA's counsel also argues that the inspector was not informed that the pump had been thrown into the area until

some time after the issuance of the order. The short answer to this is that he never asked. With respect to the argument that the area was flooded and that the individual who purportedly placed the pump where it was found ventured no further for fear of getting his feet wet is so speculative as to be rejected out of hand.

With regard to the argument that the pump was "installed," and the suggestion that it was obvious that great pains were taken to "set up" the pump and water discharge line, the inspector candidly conceded that the line is already attached to the pump, that the purported "installation" would not involve a lot of time, and that "one would just lift it up and step out there and set it down and step back out" (Tr. 149). Under the circumstances, MSHA's argument on this point is given little weight. Photographic exhibits J-4-A and J-4-B show the pump in question, and the person shown in the photograph is lifting the pump by the handles. One photograph shows the pump being held by one hand, and the second shows it being held by two hands.

Helen Mining's defense is that shift foreman Bondra heaved the pump out for about three feet, or arm's length, at the end of his shift, and that he did so to make it easier for the oncoming shift to use the pump to dispel water. Since no one observed anyone go under unsupported roof, I find Mr. Bondra's testimony as to how the pump came to rest where it did to be credible and believable. Mr. Bondra's testimony is supported by Safety Manager Skvarch who confirmed that Mr. Bondra demonstrated to him how he placed the pump in by the permanent roof supports. Further, the inspector, when called in rebuttal, conceded that Mr. Bondra's story was credible and that "it could have happened that way." The inspector also candidly admitted that had Mr. Bondra demonstrated to him how he heaved the pump beyond the roof supports, he would not have issued the violation (Tr. 312).

On the basis of all of the credible testimony in this case, I conclude and find that MSHA has failed to prove a violation. The lesson to be learned from this incident is that the failure to ask questions, or to fully develop a case when it is fresh on everyone's mind, will ultimately lead to vacation of orders and citations for failure to prove the charges by a preponderance of any credible evidence. Accordingly, the order in question IS VACATED, and the contest IS GRANTED.

Docket No. PENN 83-202-R

This contest proceeding concerns a section 104(d)(1) Order No. 2111719, issued by MSHA Inspector Lloyd D. Smith on June 1, 1983, charging Helen Mining Company with a violation of mandatory standard section 75.200. The inspector was of the view that the approved roof control plan was violated when he found that a warning sign had not been posted at an area of unsupported roof. MSHA's civil penalty proposal for this alleged violation is part of civil penalty Docket No. PENN 83-232, and MSHA initially sought an assessment of \$100 for this violation. When this docket was called for hearing, the parties advised that they proposed to settle the matter by Helen Mining Company paying a penalty in the amount of \$50.

The parties were afforded an opportunity to present their arguments in support of the proposed settlement on the record, and I take note of the fact that the inspector who issued the order in question was present in the courtroom and expressed agreement with the proposed settlement disposition of this matter (Tr. 234-239).

After careful consideration of the arguments presented on in the record in support of the proposed settlement, I conclude and find that it is reasonable and in the public interest. Accordingly, pursuant to Commission Rule 30, 29 CFR 29.2700.30, IT IS APPROVED.

ORDER

Helen Mining Company IS ORDERED to pay a civil penalty in the amount of \$50 in satisfaction of the section 104(d)(1) Order No. 2111719, issued June 1, 1983, and upon receipt of payment by MSHA, that portion of civil penalty Docket No. PENN 83-232, IS DISMISSED.

In view of the approved settlement, Helen Mining Company's counsel stated on the record, that he would withdraw the contest (Tr. 239). Accordingly, contest Docket No. PENN 83-202-R, IS DISMISSED.

Docket No. PENN 83-200-R

Fact of Violation

The inspector issued the citation in this case after observing that a portion of the belt guarding used to prevent entry into an area where a conveyor belt drive motor was

located lying on the floor and not nailed to a post where it normally is. The fan blades of that motor are protected by a metallic shroud which is attached to the motor housing. At the time he observed the belt guarding lying on the floor, he also observed that the lower portion of the shroud was broken off. Photographic exhibits J-2-A and J-2-C clearly show the motor shroud and belt guarding in question. Based on testimony during the hearing, it would appear that the shroud portion of the motor had broken off during transit approximately five days prior to the inspection in question, and that mine management had ordered a new shroud. While awaiting the new shroud, the belting in question was nailed across two posts as a means of keeping people out of the area.

The citation issued by the inspector specifically charges that "a portion of the guarding provided at the 6 East Crossover belt drive on the clearance side was laying in the mine floor." This seems to indicate that the citation was issued because the inspector believed that the belt guarding laying on the floor was obviously not securely in place as provided by subsection (c) of section 75.1722, and thus failed to provide adequate protection for the motor in question. However, since he also stated in the citation that the lower portion of the broken protective shroud exposed the fan to possible entry, one could infer that this condition also violated subsection (c). The inspector's explanation of precisely what he had in mind seems to indicate that the belting material nailed on the posts was placed there as some sort of "signal" to preclude entry into the area where the motor in question was located. When asked whether he would still require the belt guarding even if the shroud were not broken, the inspector suggested that the belting may be necessary to protect other unspecified areas in the proximity of the motor. When asked whether a citation would have been issued had the shroud not be broken off, MSHA's counsel stated "it would not with respect to the exposed moving parts on this piece of equipment."

The parties stipulated that a guard was not securely in place over the lower portion of the fan blades on the drive motor in question. At page three of his posthearing brief, Helen Mining's counsel states that the parties have stipulated to the fact that there was a violation of section 75.1722(c) in that the belt guarding was not securely in place. While I see a distinction in the two, since the parties are in agreement that a violation did in fact occur, I will not belabor the matter further. The violation IS AFFIRMED.

Good Faith Compliance

The parties stipulated that Helen Mining demonstrated good faith compliance in achieving abatement of the cited condition after the citation was issued, I adopt this as my finding and conclusion on this issue.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

The parties stipulated as to the size of Helen Mining's coal mining operations, as well as the size of the mining operations as its Homer City Mine. Based on the production figures shown at page 5 herein, I conclude and find that Helen Mining Company is a large mine operator.

The parties have stipulated that the assessment of civil penalties in these proceedings will not affect Helen Mining's ability to continue in business. I adopt this as my finding and conclusion on this issue.

History of Prior Violations

The history of prior violations at the Homer City Mine is reflected in a computer print-out for the period June 1, 1981 to May 31, 1983. That print-out reflects a total of 498 violations, eight of which are prior citations for violations of section 75.1722(c).

MSHA advances no arguments concerning the mine compliance record, and does not suggest that any penalty assessments levied for the violation should be increased as a result of this compliance record. Although I am not persuaded that eight prior citations of section 75.1722(c), indicates a lack of concern for the guarding standard cited, I take note of the fact that the computer print-out also includes five prior citations for violations of guarding standard section 75.1722(a). I also take note of the fact that 498 violations over a two year span is not a particular good compliance record, and have taken this into account in assessing the penalty for the violation in question.

Negligence and unwarrantable failure

The parties stipulated that the violation resulted from ordinary negligence, and at pages 3-4, Helen Mining's counsel confirmed that this is the case. However, at one point in time during the hearing, the parties stipulated that the guarding citation was not unwarrantable (Tr. 90),

and that the violation resulted from ordinary negligence on the part of the contestant (Tr. 91). Later, contestant's counsel conceded that the violation was unwarrantable (Tr. 98-99), and MSHA's counsel was of the opinion that a showing of ordinary negligence was sufficient to establish unwarrantability (Tr. 99). Contestant's counsel concurred in this view (Tr. 100).

MSHA's posthearing arguments contain no further discussion concerning the "unwarrantable" nature of the violation. The aforementioned cited transcript pages are indicative of what I believe to be inconsistent positions taken on the question of "negligence" and "unwarrantable." In my view, these terms are synonymous, and indicate a degree of negligence, and if the parties agree that a finding of "ordinary negligence" means unwarrantable, then so be it.

In view of the foregoing, I conclude and find that the violation in question was an unwarrantable violation caused by the respondent Helen Mining Company's ordinary negligence.

Gravity

The parties have stipulated that if an injury were to occur as a result of the violation, it would be a serious injury. Accordingly, I conclude that the violation was serious.

Significant and Substantial

Relying on the Commission's decision in Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 at 825, (1981), MSHA's counsel argues that the record contains ample evidence to support a conclusion that harm or injury was reasonably likely to occur as a result of the violation in this case. In support of this contention, counsel states that the inspector issued the citation when he observed that the fan blades of the drive motor were only partially covered by a broken shroud, and that a piece of rubber belting, which had previously been nailed to a post and placed in front of the exposed moving parts, was found lying on the mine floor at the time the condition was cited. Since the inspector testified that the rubber belting was wet and constituted a "slipping hazard," and since he also testified that an employee could fall directly into the moving fan blades, MSHA's counsel concludes that she has established a "significant and substantial" violation.

Helen Mining's argument that the violation was not significant and substantial is based on the assertion that

(1) there is no evidence that any person had been or would be exposed to the violation before the operator would have discovered the condition and corrected it, and there is no reason to believe that the guard had not been in place during the previous shift; (2) few persons ever have had any occasion to be in the immediate zone of the downed belt guarding. Further, the area was not travelled by production crews, and those persons who had business in the area would use a "clearly defined" walkway which provided ample clearance; (3) of the few persons who had occasion to come into the affected area, only the belt examiner would have occasion to do so when the equipment was running, and company policy dictated that the equipment be locked out and deenergized if maintenance work were performed; and (4) even if a person were to approach the affected area when the equipment was running, it would be unlikely that he would slip, trip, or fall into the zone of potential harm.

Finally, even if somehow all of the foregoing conditions were to occur simultaneously during the narrow window of time before the condition could be discovered and corrected, Counsel suggests that would still not likely cause an injury because it is not reasonably likely that the slipping, tripping or falling person would reach and come into contact with the moving fan blades. Not only was the gap in the guarding through which a person would have to fall just 2 feet wide (26 inches) according to the inspector (Tr. 38-39), but it was another 3 feet to the edge of the shroud at a minimum (Tr. 78). Only a portion of the guard was down and the intact portion prevented a person from contacting the exposed part of the fan blades head on. The motor base restricted access to the exposed portion of the fan blades from the sides and from below, while the housing of the motor and the intact portion of the shrouding limited the likelihood that a person falling into the area would come into contact with exposed blades from the top or side. As a result, it would take a concerted effort by a person to contort himself to come in contact with the fan blades (Tr. 64, 73; see Exh. J-1, J-2).

After close scrutiny of the testimony and evidence adduced by the parties in support of their case, including their posthearing arguments, I conclude and find that Helen Mining Company has the better part of the argument that the cited guarding citation was not significant and substantial. It seems obvious to me that the citation was issued because the inspector believed that the belt guarding material was not in place at the time of his inspection. Given those facts, I cannot conclude that anyone passing outby the posts, which served to anchor the belting material could have inadvertently

fallen into the unguarded lower portion of the motor in question, thereby becoming entangled in the moving fan. The motor was located in an elevated position on a concrete platform, the upper portion was guarded by a metal guard, and the distance from the elevated concrete slab to the belt guarding in question was such, that in my opinion, would take a deliberate act to place someone in contact with the moving blades.

On the facts of this case, I am convinced that the belt guarding in question was placed there to serve as a warning that inby that area there was a motor with a guard which had been damaged, and that persons should avoid the area. In these circumstances, the actual guarding device was the metal grill work affixed to the motor itself, and not the belting material. However, the cited condition, as described by the inspector, clearly identifies the belting material, rather than the metal grill work as the guarding device. Given these circumstances, I am not convinced that the belt guarding, even if it were in place, would have served any useful purpose in preventing one from being caught in the exposed fan motor. Therefore, the fact that the belting was not in place, is not significant and substantial.

In view of the foregoing findings and conclusion, I cannot conclude that MSHA has established that the violation was significant and substantial. Accordingly, the inspector's finding in this regard IS VACATED. I agree with Helen Mining's proposed conclusion that the chain of circumstances which would have to combine to cause an injury is too attenuated and the probability of injury too remote to sustain a section 104(d)(1) citation. Accordingly, the citation is modified to a section 104(a) citation, and as previously noted, the violation is affirmed.

Docket No. PENN 83-201-R

Fact of Violation

In this case, Inspector Smith cited a violation of section 75.500(a), after observing a nonpermissible switch-box lying in a room located in a working place inby the last open crosscut. It seems clear to me that Inspector Smith issued the order in question because he believed that the nonpermissible switchbox in question had been used on the previous shift in conjunction with the pump which he found inby permanent roof supports. His citation states that the switchbox was being used to supply electric power to the pump,

and while he had no direct evidence that this was in fact the case, Mr. Smith's belief was based on circumstantial evidence.

The applicable language found in section 75.500(a), is as follows:

(a) All junction or distribution boxes used for making multiple power connections inby the last open crosscut shall be permissible; * * *

In his posthearing brief, Helen Mining's counsel points out that there is no disagreement that the switchbox in question was nonpermissible and that the area where it was found by the inspector was in fact inby the last open crosscut. Counsel points out that where the parties disagree is whether or not the switchbox was in fact used there.

In support of its position, Helen Mining's counsel points to the fact that MSHA's evidence that the switchbox had been used was the fact that the deenergized box was found there attached to the pump at the start of the next shift (Tr. 105-109, 133-134, 308, 309). In contrast, all of the relevant testimony was that the pump had not been used there with the nonpermissible switch (E.g., Tr. 170-174, 205-207, 251; Exh. C-3).

Counsel maintains that the uncontested evidence as to the pattern of operations during the shift in question belies any such inference: all of the relevant testimony details Helen's compliance with the standard throughout the shift, first in using a permissible pump in the 8 to 9 crosscut early in the shift, in keeping the switchbox outby when using a nonpermissible switch in the 9 room, in ordering the replacement permissible switch from the surface, and in not even setting up the nonpermissible switch on the pasts and insulated mat when it was taken over to the 8 to 9 crosscut at the end of the shift (E.g., Exh. C-1, C-2, C-3, C-5; Tr. 170-171, 175-177, 202, 205-206).

Counsel also argues that credible weight should be given to the statements of the UMWA miners as to compliance with the standard at all times during the shift, and that in the absence of any evidence to the contrary, Helen Mining is entitled to the presumption of legality. Finally, counsel suggests that MSHA has not proven that the standard was violated by using the switchbox to supply power to the pump during the previous shift, and that MSHA's speculative inference is simply not enough to support the violation.

In response to MSHA's "theories" that liability should nonetheless be imposed on Helen Mining because (1) the nonpermissible switch was intended to be used there (Tr. 118); (2) it could have been used there (Tr. 115, 118); (3) even if it were not used there to supply power, it was "used" just by the fact of being there attached to the pump (Tr. 112-115), counsel states that MSHA's action must stand or fall on the basis of the reasons stated by the inspector when he issued the citation, and not by "inventive" posthearing arguments by MSHA's counsel. Even if one were to consider MSHA's post hoc arguments as legally cognizable, counsel suggest there is no evidence to support them. In support of this conclusion, counsel points to the fact that MSHA's theory rests only on the inspector's supposition, derived from the fact that the pump and switch were in the 8 and 9 crosscut and could have been used to pump the water out. Further, even if they were, counsel asserts that the inspector's supposition flies in the face of the evidence here that there was no intent to use the pump until the permissible switch which had been ordered from the surface and brought in at the beginning of the shift had been installed (Tr. 134, 174, 183-184; Exh. C-3).

Helen Mining's counsel goes on to argue that MSHA's "clever" reading of the standard to say that the very function of "making multiple power connections" in the 8 to 9 room was the proscribed use of the switchbox must fail because though multiple connections were arguably made (cable to switch, switch to cable to pump), "multiple power connections" were not made because it is abundantly clear that power was never connected by means of the switchbox in question in the cited crosscut. Further, counsel points out that the pump-switch assembly was never energized since the power plug was pulled at the power center before the unit was ever taken into the crosscut and there is no evidence that it was subsequently energized.

Finally, in anticipation of MSHA's arguments, as developed by its discovery, that its Inspector's Manual states a general MSHA policy that "A violation of section 75.500 exists whenever a unit of nonpermissible electric equipment is taken into or used in or inby the last open crosscut . . .," counsel responds that MSHA may not interpret section 75.500 in this way. Aside from the fact that the standard does not state this policy interpretation on its face, counsel cites the language of subsection (b), (c) and (d) of section 75.500, which proscribes nonpermissible equipment taken into and used inby the last open crosscut, and states that this

language "stands in stark contrast" to the language found in subsection (a) that only the use of such nonpermissible switchboxes is proscribed. Citing several court decisions, counsel concludes that "where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."

In support of its case, MSHA's counsel asserts that the inspector issued the citation after observing that the pump and switchbox in circumstances which led him to conclude that the switchbox was used or was going to be used to rid the area of excess water. MSHA concludes that since the cable which led from the box to the power center had not been "tagged out" or "dangered off" in any way, the inspector further concluded that the nonpermissible switchbox was readily available for use by any employee who wanted to start the water pump.

MSHA cites the definition of "permissible" as follows, as set forth at 30 CFR 75.2(i):

"Permissible" as applied to electric face equipment means all electrically operated equipment taken into or used in by the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment . . . (Emphasis added.)

MSHA asserts that the inspector made a reasonable inference from the conditions he observed upon entering the place that nonpermissible equipment was used in violation of section 75.500(a). Further, MSHA suggests that even if the inspector's conclusion regarding the use of the box was erroneous, the presence of the nonpermissible box in by the last open crosscut, where it was admittedly used to connect two power cables, is sufficient to establish a violation.

MSHA contends that section 75.500(a) clearly prohibits the operator from locating a nonpermissible junction or distribution box "used for making multiple power connections" inby the last open crosscut. In this case, MSHA maintains that the box was, in fact, used to make two power connections, i.e., one power cable connected to the box and leading to the pump and one power cable connected to the box and leading to a location at or near the power center. The fact that the power cables were not energized at the time the inspector saw the condition does not change the fact that both were connected to the nonpermissible box which was located inby the last open crosscut.

MSHA maintains that its position is further supported by the definition of permissibility cited above. It refers to "all electrically operated equipment taken into or used inby the last open crosscut . . . including, . . . associated electrical equipment, components, and accessories . . ." This definition goes on to state that the purpose of such permissibility requirements is:

. . . to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed . . . to prevent, to the greatest extent possible, other accidents in the use of such equipment
. . . (Emphasis added).

In response to Helen Mining's argument that there was no violation because the pump was not operating, the cables were not energized, and the pump had not been used on the previous shift, MSHA submits that this interpretation would not assure the prevention of the very hazard which the standard is designed to prevent. The condition observed by Inspector Smith posed a definite risk of mine fire or explosion because the power connections were made and management failed to insure that the improper equipment would not be energized while in the high-risk location of the working place.

Conceding that there are no reported Commission decisions interpreting section 75.500(a), MSHA suggests that the Commission has considered issues raised by operators in similar contexts which do offer some guidance in this case. Counsel cites Secretary v. Eastover Mining Co., 2 FMSHRC 1638 (1982), where the Commission considered the circumstances under which a violation of 30 CFR 75.507 occurs. That standard requires that "except where permissible power connection units are used all power-connection points outby the last open crosscut shall be in intake air." In Eastover a pump control box with nonpermissible connection points was located in return air. The operator claimed that since the equipment was not energized, a violation was not established. In upholding the violation, the Commission explained:

. . . merely finding a (nonpermissible) power-connection point in return air does not necessarily absolve an operator simply because it is nonenergized. In such cases, a violation may occur if the equipment has been, is about to be, could be, or habitually was, operated in return air. Cf. Solar Fuel Company, 3 FMSHRC 1384 (1981) (Emphasis added).

Counsel points out that in the instant case the inspector was of the opinion that the pump had been used with the non-permissible box, and that the box could be used and in fact, was readily available for use. Counsel maintains that this was not a situation where an isolated electrical component was inadvertently placed in by the last open crosscut, unconnected to any equipment or power source. The operator did not demonstrate with any assurance that this nonpermissible box "could not or would not have been energized."

Counsel cites two Commission decisions where it was held that the word "used," when found in a mandatory standard, should be interpreted to mean "could be used" as well. Secretary v. Ideal Basics Industries, 2 FMSHRC 1243, 1244 (1981); Secretary v. Solar Fuel Company, 2 FMSHRC 1359, 1360 (1981). Counsel suggests that these decisions indicate that, in view of the very serious hazards posed by the use of nonexplosion proof equipment in locations where methane may be emitted, the standard should be interpreted in such a manner that assures prevention of the harm. Counsel concludes that Helen Mining's interpretation of the cited standard is extremely technical and would permit a result that is inconsistent with the intent of the regulation.

By letter dated February 7, 1984, Helen Mining's counsel takes issue with MSHA's posthearing arguments concerning the applicable definition of the term "permissible." Counsel argues that since the separate requirements set forth in section 75.500(b) through (d), all address equipment "taken into or used in by the last open crosscut," the cited definition of the term "permissible" as found in section 75.2(i), and as relied on by MSHA would apply to any citations for violations of those subsections. However, since Helen Mining here has been cited with a violation of subsection (a) of section 75.500, which requires that boxes used for making multiple power connections in by the last open crosscut to be permissible, counsel asserts that the definition found in section 75.2(c)(1) is applicable in defining the term "permissible" as used in section 75.500(a). That definition states as follows:

(c) 'Permissible' as applied to--(1)
Equipment used in the operation of a coal mine, means equipment, other than permissible electric face equipment, to which an approval plate, label, or other device is attached as authorized by the Secretary and which meets specifications which are prescribed by the Secretary for the construction and maintenance of such equipment and are designed to assure that such equipment will not cause a mine explosion or a mine fire.

In the Eastover Mining Company case, supra, although the Commission affirmed the Judge's holding on the facts of the case, it specifically rejected the Judge's broad construction that a violation of section 75.507 always occurs whenever nonpermissible power connection points are located in return air regardless of the circumstances. The Commission emphasized the fact that the purpose of the standard was to prevent methane gas explosions caused by sources of ignition, such as arcing from power connections. The Commission observed that the arcing of power connection points is only possible if the equipment is energized or can be energized. The Commission went on to explain that a violation may occur if the equipment has been, is about to be, could be, or habitually was, operated in return air.

The facts in Eastover Mining are similar to those in the instant case, and these are explored by the Commission as follows at 2 FMSHRC 1638-1639:

We now apply the preceding principles to the facts of this case, based on the record as developed below. There is no question that the pump control box was not energized when the inspector issued the order. The foreman who placed the equipment in the return air during the shift prior to the one during which the inspection occurred testified that there was not enough cable to connect the pump to the power center. He also testified that he was familiar with the regulation and would not have left the control box in the return air if it were energized.

In this case it is claimed that the unit was not in fact located in the return air but was simply placed there temporarily until it could be moved to intake air.

In other words, it is contended that the location was merely an interrupted transit to another position where it would be located as required by the regulation.

Nevertheless, the record does not contain a satisfactory explanation of why the control box was left in the return air. Nor has Eastover completely dispelled our concern that the only reason the pump control box was not energized in return air was because the connecting cable was too short -- a 'problem' which unfortunately suggests an original intent to energize in return air and a possible intent to 'remedy' the situation by means other than moving the control box into intake air. We will not, however, indulge in speculative hypotheses. The record before us does not allow us to say with assurance that Eastover clearly showed that the equipment could not or would not have been energized in return air. Our concern is underscored by the undisputed facts that the mine had a history of methane liberation (the major danger in the event of arcing) and .1 to .2 volume percent of methane was found at the working place when the order was issued.

MSHA makes the point that the switchbox plug was not "tagged out" or otherwise "dangered off." Even if it were, I suspect that MSHA would still argue that a violation occurred. As a matter of fact, in Eastern Associated Coal, 1 FMSHRC 2209 (1979), the Commission ruled that even though a mine operator placed a "danger tag" on a piece of equipment which had been cited for an inoperable parking brake, a violation still existed since the equipment remained operable in a working area. The Commission ruled that tagging out the piece of equipment did not abate the violation because:

We hold that tagging the jitney was not sufficient to withdraw the jitney from service because the danger tag did not prevent the use of the defective piece of equipment. The jitney was still operable and the danger tag could have been ignored.

In Ideal Basic Industries, 2 FMSHRC 1242, 1243 (1980), the Commission held that:

If equipment with defects affecting safety is located in a normal work area, fully capable of being operated, that constitutes 'use'. Here, at the time of the inspection, the mobile was parked in a usual location, right next to the area where railroad cars - which the mobile is used to move - are loaded. It was neither rendered inoperable nor in the repair shop. To preclude citation because of "non-use" when equipment in such condition is parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives.

Although on the facts of this case, we are not dealing with equipment "defects," the construction of the term "use" is pertinent in the context of nonpermissible equipment.

In Solar Fuel Company, supra, the Commission interpreted the application of section 75.503, which requires a mine operator to maintain in permissible condition electric face equipment which is taken into or used inby the last open crosscut. The Commission reversed the Judge's ruling that the "intent" to take such equipment is not controlling, and that in order to establish a violation it must be shown that an operator did not maintain in permissible condition equipment which was taken into or used inby the last open crosscut. In reversing, the Commission emphasized the fact that the requirements for maintaining such equipment "permissible" is to assure that mine fires or explosions do not occur. Thus, the Commission reasoned that the emphasis "is not where equipment is located at the time of inspection, but simply whether it is equipment which is taken or used inby." The Commission then concluded that section 75.503 applies not only to equipment which has been taken inby the last open crosscut when inspected, but also to equipment which is intended to be or is habitually taken or used inby, even if it is inspected while located outby.

The term "face equipment" is defined at pg. 407 of the Mining Dictionary as "mobile or portable mining machinery having electric motors or accessory equipment normally installed or operated inby the last open crosscut in an entry or a room." In this case, the electric pump, powered by a motor and the switchbox in question, fits the definition of electric face equipment, and the parties concede that it is the type of equipment covered by the cited standard.

A "switch" is defined by the Mining Dictionary, 1968 Edition, at pg. 1111, as a "mechanical device for opening and closing an electric circuit." The term "connection box, electrical," is defined at pg. 251 as "a boxlike enclosure with removable face or plate within which electric connections between sections of cable may be made."

There is no credible evidence to prove that the non-permissible switchbox in question was in fact used to supply power to the permissible pump at the location where the inspector observed it. The pump was not energized or pumping water when he observed it, and he had no reason to believe that the cable plug was plugged into the power center or tagged out because he did not walk down to the power center before deciding to issue the order. His belief that the pump had been used on the prior shift, with the switchbox supplying the power, was based on circumstantial evidence, and MSHA has not rebutted Mr. Bondra's explanation as to the circumstances concerning the use of the pump and switchbox in question. Mr. Bondra's explanation is corroborated by the testimony of the electrician and mechanic (Plovetsky), and the inspector himself conceded that Mr. Bondra's explanation was plausible. Further, the circumstances surrounding the ordering and delivery of a replacement permissible switchbox lends credence to Mr. Bondra's explanation.

Although the unsworn statements of the miner's offered by Helen Mining's counsel are self-serving, the prior statement by Mr. Plovetsky is consistent with his testimony. With regard to the other statements, they were made available to MSHA in advance of the hearing as part of the discovery process, and MSHA had an opportunity to subpoena the miners if it had reason not to believe their statements. In any event, the statements concerning the actual use made of the pump and switchbox in question add nothing to the testimony of record in this case.

In this case, Helen Mining is charged with using a nonpermissible switchbox to supply power to a permissible pump purportedly used to pump water on a shift prior to the one where the cited conditions were observed by the inspector. On the basis of all of the credible evidence and testimony adduced in this proceeding, I conclude and find that Helen Mining has rebutted MSHA's circumstantial case, and has established that the switchbox and pump in question were not in fact used to pump water as charged by the inspector in this case. However, given the language found in section 75.500(a), which is different from that found in subsections (b), (c), and (d), as well as in

section 75.507, the question presented is whether these prior interpretations in the context of the cases cited herein are equally applicable to the facts presented in this case.

MSHA recognizes the fact that the prior cases considered by the Commission concern interpretations of the words "taken into or used." Had the inspector in the instant case cited Helen Mining with a standard using those words, I would be constrained to find that MSHA has established a violation in that the nonpermissible switchbox was taken into an area which was inby the last open crosscut. As a matter of fact, Helen Mining stipulated that the box in question was located in the working place, inby the last open crosscut at the time the inspector observed it.

The regulatory language found in subsection (a) mandates that boxes used for making multiple power connections inby the last open crosscut shall be permissible. Thus, the critical question presented is whether or not MSHA has established that the switchbox was used for making a multiple power connection during the prior shift, as charged in the violation. Since I have concluded that MSHA has not established that the switchbox was used to supply power to the pump on the previous shift, logic dictates that I make the same conclusion and finding with respect to this question. However, before reaching that conclusion, a review of the Commission's prior interpretations of the permissibility regulations found in the cited cases is in order.

As I read the prior Commission rulings in the cited cases relied on by MSHA in support of its case, it seems clear to me that the Commission believes that the intent of any permissibility regulation is to assure that all possible temptation to use nonpermissible equipment inby the last open crosscut be removed by an interpretation that practically prohibits the physical taking of such nonpermissible equipment inby the last open crosscut, regardless of whether "it is used," "intended to be used," "habitually used," or "ready to be used."

Helen Mining maintains that since the definition of "permissible" found in 30 CFR 75.2(i), includes a reference to electric face equipment taken into or used inby the last open crosscut, it may only be applied to citations based on subsections (b), (c), and (d) of section 75.500, because those subsections contain those very same words, while the cited subsection (a) does not. Helen Mining asserts that the proper definition for "permissible," in the context of an alleged violation of subsection (a), is that found in 30 CFR 75.2(c)(1).

On the facts of this case, the nonpermissible switchbox in question was characterized as "nonpermissible" because it was not constructed as an approved explosion proof device which has MSHA's "seal of approval." While there was some testimony that a wire or connection had become damaged when the box was dragged to another location during the beginning of Mr. Bondra's shift, that fact alone did not render the box in question "nonpermissible." Thus, on the facts here presented, regardless of which definition is applied, MSHA's arguments with respect to the intent and purpose of the permissibility regulations referred to in this case are well taken. Both definitions take into account the fact that the required permissibility parameters for the design, construction, and maintenance of such equipment are intended to assure that such equipment will not contribute to a mine fire or explosion.

Helen Mining's argument that a multiple power connection had not been made because the power cable had not been plugged into the power center is rejected. While it is true that the inspector did not know whether the power plug was actually plugged into the power source at the time he observed the switchbox and pump, Mr. Bondra confirmed that he did not tag or "danger off" the plug when he left the switchbox and pump for the next shift.

On direct examination, Mr. Bondra testified that he informed incoming foreman Mitsko that he needed a switch for the pump and that he should not use the pump until the new switch was installed (Tr. 184). He claimed that this conversation took place between the change in shifts. However, in response to my questions, Mr. Bondra testified that he did not tell Mr. Mitsko that he had left the pump with the nonpermissible switch attached to it at the location where it was found by the inspector, nor did he tell him that he had not plugged in the power. When asked why, Mr. Bondra responded that there was not enough time (Tr. 197). I find it rather incredible that section foreman Bondra could not find the time to pass on this information to Mr. Mitsko. In view of Mr. Bondra's previous explanation that he left the pump and switchbox where he did without tagging out the power plug because "he did not have time," I suggest that in the future he reexamine his priorities and take the time to carry out these supervisory details.

Mr. Bondra's testimony confirms Inspector Smith's testimony that Mr. Mitsko advised him that the power plug had not been tagged out, and since Mr. Bondra did not discuss the matter with Mr. Mitsko before the switchbox and pump were

discovered by the inspector, it also supports Inspector Smith's assertion that Mr. Mitsko had no knowledge that the switchbox and pump were left by Mr. Bondra.

Further confirmation that the power plug was not tagged out came from the mechanic, Mr. Plovetsky. He also confirmed that he could not lock out the power at the power center at the end of the shift when Mr. Bondra left the switchbox and pump because he had no lock-out device. Further, even though he was qualified to remove the nonpermissible switchbox, Mr. Plovetsky did not do so, nor did he speak to any of the incoming shift personnel to notify them that the switchbox and pump were left by Mr. Bondra, and that the power plug and power source were not locked out.

In view of the foregoing circumstances, while there is no direct evidence that the nonpermissible switchbox was used on the prior shift, I am not convinced that Helen Mining has established that the pump and switchbox could not or would not be energized and used by the oncoming shift at the location where it was left by Mr. Bondra. In addition, I am not persuaded by the self serving disclaimer statements compiled by mine management to defend the citation, and they are rejected as a defense. It seems to me that with a little more attention to their duties, Foreman Bondra and Mechanic Plovetsky could have, and should have, either removed the switchbox, or at least secured the power source by obtaining a lock-out device, or tagging out the plug. By leaving the pump and nonpermissible switchbox, with the cable untagged, and with the power source not locked out, they did precisely what the Commission expressed concern about in Eastover Mining Co., Ideal Basic Industries, and Solar Fuel Company, supra. Accordingly, I conclude that the interpretation and application of the language "used for making multiple power connections" as found in section 75.500(a), should be precisely how the Commission interpreted the word "used" in the Eastover Mining Co. case, as well as the other cases cited by MSHA in support of the violation. All that was necessary here to energize the pump and switchbox was for someone to plug in the cable to the power source, and I am not convinced that Helen Mining has demonstrated with any assurance that this was not the case. Accordingly, I conclude and find that MSHA has established a violation of mandatory standard 30 CFR 75.500(a). The section 104(d)(1) Order No. 2111718, IS AFFIRMED, and the Contest IS DENIED.

Significant and Substantial

Helen Mining agrees that if an injury were to occur as a result of the alleged violation, it could reasonably

be expected to result in a potentially serious injury. However, its defense to the inspector's "significant and substantial" findings is based on the argument that only an examiner and the person moving the pump would have any occasion to be in the area on an infrequent and brief basis, and that the possibility of an accident would be extremely remote.

At page 34 of his posthearing brief, Helen Mining's counsel cites several hearing transcript references to support his assertion that the oncoming foreman (Mitsko) and his mechanic (DeCarlo) were the only people who would energize the switchpump assembly. Counsel asserts that they had been told that they had to replace the switch before they could pump water. Mr. Mitsko is deceased and Mr. DeCarlo did not testify.

Mr. Plovetsky's testimony is that the oncoming mechanic and foreman were the only persons who should be responsible for energizing the power cable (Tr. 217-218). However, Mr. Plovetsky testified that he said nothing to anyone from the oncoming shift about the facts surrounding the power cable. Mr. Skvarch's testimony, at Tr. 249-255, simply recounts the information he developed during his investigation of the order, and it seems clear to me that he simply relied on Mr. DeCarlo's prior self-serving statement that he was to take the new permissible switchbox into the section. Further, the statements of the miners on the 12:00 to 8:00 shift, exhibits C-3-B, C-3-C, and C-3-D, attesting to the fact that the pump was not used on their shift, and that they knew that a new switch had been ordered, is not relevant to what the oncoming shift would have done. Likewise, the statements by the miners listed in exhibit C-3(e), that it was not their job to operate pumps, and that they would not energize one if they thought it was illegal to do so is not persuasive. I conclude that since the pump and switchbox were placed and located in such a position as to make them readily available for use by someone merely plugging in the power cable, the possibility of this happening was not remote. This is particularly true where it appears that the area in question was flooded, and that the pump may have previously been used to pump water in the same area where the inspector found it when he happened on the scene.

Although it may be true that the amount of methane detected by the inspector when he observed the pump and switch was not particularly substantial, given the fact that the mine does liberate a million cubic feet of methane in a 24 hour period, should there be any interruption to the ventilation,

the use of a nonpermissible switchbox would present an ignition source if the pump were inadvertently energized. Since there was a realistic potential present that someone could have inadvertently plugged in the pump and switch to begin pumping out the water which was present in the area, I conclude that there was a real potential for an accident, and Helen Mining's assertions to the contrary are rejected. I conclude and find that MSHA has established that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

Unwarrantable Failure

Helen Mining's arguments that the violation was not an unwarrantable failure ARE REJECTED. I agree with MSHA's posthearing proposed findings and conclusions that the facts and circumstances in this case support a conclusion that the violation resulted from Helen Mining's unwarrantable failure to comply with the cited standard. In my view, Section Foreman Bondra's actions in creating the conditions which resulted in the violation, when combined with his failure to take reasonable steps to insure that the switchbox in question was either tagged out or removed, clearly demonstrate to me that he knew or should have known of the violation, and that in these circumstances, he failed to exercise due diligence to prevent the conditions which the inspector reasonably concluded amounted to a violation. Contrary to Helen Mining's arguments, Mr. Bondra's conduct is attributable to Helen Mining, and I conclude and find that it should be held accountable for this conduct. I adopt MSHA's posthearing proposed findings and conclusions on the question of "unwarrantable failure" as my findings and conclusions on this issue, and the inspector's finding in this regard IS AFFIRMED.

History of Prior Violations

As indicated earlier, Helen Mining's history of prior violations for the period June 1, 1981 to May 31, 1983, reflects a total of 498 prior violations. However, I take note of the fact that this listing reflects no prior citations for violations of mandatory standard 30 CFR 75.500(a), and I have taken this into account in the civil penalty assessment for the violation in question.

Good Faith Compliance

The record establishes that once the order issued Helen Mining achieved timely abatement of the violation in question, and I have considered this in the civil penalty assessed for the violation in question.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

The parties stipulated as to the size of Helen Mining's coal mining operations, as well as the size of the mining operations at its Homer City Mine. Based on the production figures shown at page 5 herein, I conclude and find that Helen Mining Company is a large mine operator.

The parties have stipulated that the assessment of civil penalties in these proceedings will not affect Helen Mining's ability to continue in business. I adopt this as my finding and conclusion on this issue.

Gravity

I conclude and find that the circumstances concerning this violation presented a reasonable likelihood of an injury or an accident, and that the failure by Helen Mining to insure that the nonpermissible switchbox was not removed from the area in question, and was permitted to remain without locking out the power source or tagging out the plug constituted a serious violation.

Negligence

I conclude and find that the failure by Section Foreman Bondra to see to it that the switchbox was removed from the area in by the last open crosscut, or to at least see to it that the power cable plug was tagged out or the power source locked out indicates a reckless disregard for the safety of the oncoming crew. It seems clear that even though Mr. Bondra and the mechanic working on his same shift (Plovetsky), had an opportunity to do so, they did not take reasonable steps to insure that the switchbox would not be used, nor did they inform the oncoming crew that the switchbox and pump were left in a location where anyone could reasonably have believed that it was ready to be energized and used to pump out the water which was in the area. In these circumstances, I conclude and find that the violation resulted from gross negligence, and this is reflected in the civil penalty assessed by me for the violation in question.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the violations which have been affirmed:

PENN 83-200-R


<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2111715	5/25/83	75.1722(c)	\$375

PENN 83-201-R

<u>Order No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2111718	6/1/83	75.500(a)	\$2800

ORDER

Helen Mining Company IS ORDERED to pay the civil penalties assessed by me in the amounts shown above within thirty (30) days of the date of these decisions, and upon receipt of payment by MSHA, these cases are dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAR 6 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 80-217-M
Petitioner	:	A.C. No. 48-00155-05030
	:	Docket No. WEST 80-292-M
	:	A.C. No. 48-00155-05038 I
	:	Docket No. WEST 80-299-M
	:	A.C. No. 48-00155-05039
	:	Docket No. WEST 81-28-M
v.	:	A.C. No. 48-00155-05058
	:	Docket No. WEST 81-32-M
	:	A.C. No. 48-00155-05061 V
	:	Docket No. WEST 81-332-M
	:	A.C. No. 48-00155-05077 I
ALLIED CHEMICAL CORPORATION,	:	Docket No. WEST 81-405-M
Respondent	:	A.C. No. 48-00155-05085
	:	
	:	Alchem Trona Mine

DECISION

Appearances: Stephen Kramer, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
John A. Snow, Esq., VanCott, Bagley, Cornwall,
and McCarthy, Salt Lake City, Utah,
for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

These consolidated cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. In each case, the Secretary seeks to have a civil penalty assessed for an alleged violation of a mandatory safety standard.

An evidentiary hearing was held in Green River, Wyoming. Based upon the entire record and considering all of the arguments of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

ISSUES

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in these proceedings; and, if so, (2) the appropriate civil penalties that should be assessed against the

respondent for the alleged violations based upon the criteria as set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

STIPULATIONS

The parties stipulated to the following:

1. Respondent is the owner and operator of the Alchem Trona mine.
2. The products produced by the said mine enter and effect commerce.
3. All of the above cited cases, except for Docket No. WEST No. 80-217, are governed by the provisions of the Federal Mine Safety and Health Act of 1977 and are properly before the Federal Mine Safety and Health Review Commission.
4. That if penalties are assessed in these cases, it will not affect respondent's ability to continue in business.
5. The respondent has two million, thirteen thousand and twenty five man hours annually and is considered a large mining operation.
6. The Mine Safety and Health Administration (MSHA) inspectors involved in the above cited cases were duly authorized representatives of the Secretary of Labor (Secretary) at all times relevant herein.
7. In respect to Docket No. WEST 80-217-M, in the twenty four months prior to September 25, 1979, 251 violations were assessed against the respondent.
8. In Docket No. WEST 81-32-M, 482 violations had been assessed against respondent.
9. In Docket No. WEST 81-405-M, 350 violations had been assessed against respondent in the 24 months preceding June 9, 1981.

Docket No. WEST 80-217-M

Citation No. 575879 (A)(B)(C)(D)(E)(F)(G)

Petitioner issued a type 107(a) and 104(a) order alleging violations of several mandatory safety standards in a fuel storage area being used by Peter Kiewit and Sons Construction Company (Exhibit GX-1). The facts in this case show that the fuel storage area is located on property owned by Church and Dwight Co. Inc. This property is adjacent to the property where the Alchem Trona Mine (Alchem mine) operated by the respondent is located. The fuel storage area was being used by Peter Kiewit and Sons, an independent contractor working at the Alchem mine when the order was issued (Exh. GX-7). Based upon this record and subsequent to the hearing, the Secretary has filed a motion to dismiss Docket No. WEST 80-217-M with prejudice citing the Commission's decision in Secretary v. Phillips Uranium Corp., 4 FMSHRC 549. The Secretary stated that he felt the decision in Phillips, supra is controlling on the facts in this case. I agree. Docket No. WEST 80-217-M is ordered dismissed with prejudice.

Docket WEST 80-292-M

Petitioner alleges respondent violated 30 C.F.R. § 57.9-3 when an accident occurred at the Alchem Mine causing serious injuries to a miner. The cited standard provides as follows:

Mandatory. Powered mobile equipment shall be provided with adequate brakes.

Citation No. 336642 issued in this case states that the respondent's LBT lube truck was not provided with operable brakes and that the emergency brake was disconnected. The unit moved ahead and injured a miner working between the lub truck and a continuous miner.

The Secretary originally proposed the assessment of two penalties in this case as follows: Citation No. 336642A for violation of 30 C.F.R. § 57.9-3 and proposed a penalty of \$7,000.00 and Citation No. 336642B for violation of 30 C.F.R. § 57.9-37¹/ proposing a penalty of \$3,500.00.

¹/ 57.9-37 Mandatory. Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement..

At the hearing, the parties moved that the Court approve a settlement in this case of \$5,000.00 to be divided equally between the two alleged violations. The Secretary stated that it was his belief that he could not show a direct connection between the violation and the accident to establish a high degree of negligence in this case. However, it was believed that there is some degree of negligence involved in order to justify the proposed amended penalty of \$5,000.00. Based upon a review of the record in this case and the representations of the parties, I find the proposed settlement is in accord with the Act. The stipulated agreement and motion of the parties is granted and penalty amounts of \$2,500.00 each for citation Nos. 336642A and 336642B are approved.

WEST 80-299-M

Citation Nos. 336643 and 336644

In this case, petitioner alleges respondent violated 30 C.F.R. § 57.21-78. The cited standard provides as follows:

Mandatory. Only permissible equipment maintained in permissible condition shall be used beyond the last open crosscut or in places where dangerous quantities of flammable gases are present or may enter the air current.

During an investigation of an accident at respondent's Alchem Mine, MSHA inspector Melvin Jacobson issued citation Nos. 336643 and 336644 charging that two non-permissible vehicles were operated in the last open crosscut.

Jacobson testified that he observed a lubrication truck and a maintenance vehicle located south of 96+23 crosscut in the 5 south entry of panel F-Main south of the Alchem Mine (Transcript at 4). This part of the mine consisted of seven entries ^{2/} which are referred to in the testimony as rooms, numbered from east to west as one (1) through seven (7). The mining process used in this particular mine is a room-pillar method. In the section where the violations are alleged to have occurred, there were two crosscuts. The most northerly was designated as crosscut 96+23 and the next crosscut to the south nearest the face as crosscut 97+23. Both crosscuts were driven through the seven rooms except for crosscut 97+23 which crosscut had not been completed or opened between rooms 5 and 4 (Exh. GX-13).

On the day of the accident prompting this inspection, the lube truck had entered the F-Main South panel coming from the north traveling south through room 3. At crosscut 96+23, it turned left

2/ An underground passage used for haulage or ventilation.

and traveled to room 5 where it was parked in the intersection of room 5 and crosscut 96+23 at a right angle in front of the continuous miner. The lube truck remained in this location for approximately 40 minutes with its engine running at a fast idle to provide power to run a compressor used to dispense material for servicing the continuous miner. The truck rolled forward pinning a miner between the truck and the continuous miner. After the accident, the lube truck was backed into room 5 just south of crosscut 96+23 near a maintenance truck also parked in the area. (Tr. at 8 thru 11 and Exh. GX-13). At the time the accident occurred, the mine was not in operation and only maintenance work was being performed (Tr. at 40).

The petitioner contends that the two trucks involved herein were not permissible equipment and were in by the 96+23 crosscut in room 5 and that this crosscut was the last open crosscut at this particular location in panel F-Main South (Petitioner's Brief at 1).

Respondent denies this and contends that crosscut 97+23 at room 5 was the last open crosscut in this section of the mine (Respondent's Brief at 7, 8).

The condition or practice cited by Inspector Jacobson in the two citations allege that the two pieces of non permissible equipment were being operated "in the last open crosscut." The cited standard § 57.21-78 states that only permissible equipment shall be used beyond the last open crosscut or in places where dangerous quantities of flammable gasses are present. At the hearing, the inspector testified that he observed both vehicles "parked beyond the last open crosscut in room 5" (Tr. at 4). Although the wording of the two citations is not explicit as to the violation alleged to have occurred, there is no doubt from the evidence presented at the hearing and the arguments in the post hearing briefs that both parties understood the issues.

The threshold issue is which crosscut, 97+23 or 96+23 at room 5, was the last open crosscut. There is no disagreement as to the fact that the two vehicles were both non permissible equipment under the Act or that after the accident, they were parked in room 5 south of crosscut 96+23.

Neither the Act or the metal and nonmetallic underground standards define the term "last open crosscut." The term "crosscut" is defined in the Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms, (1968) p. 280, as follows:

- a. A small passageway driven at right angles to the main entry to connect it with a parallel entry or air course. ... f. In room and pillar mining, the piercing of the pillars at more or less regular

intervals for the purpose of haulage and ventilation. Synonym for breakthrough. Kentucky, p. 332. g. In general, any drift driven across between any two openings for any mining purpose. Bureau of Mines Staff.

Some clarity of the term last open crosscut can be derived from the standards that apply to underground coal mines. The common usage of various terms in the mining industry, although not necessarily universal, often applies to both coal and metal and nonmetallic mines. 30 C.F.R. § 75.503 provides in part as follows: "The operator of each coal mine shall maintain in permissible condition all electric face equipment ... which is taken into or used inby the last open crosscut of any such mine."

The distinction here is that the coal standard states "inby the last open crosscut" whereas the standard cited in the present case reads, "beyond the last open crosscut." I do not believe the drafters of the standard intended a distinction here. Nor did the witnesses who testified at the hearing or the parties in their briefs contend a different meaning for they regularly referred to the location of the equipment as "inby" the last open crosscut rather than beyond. Accepting the term "inby" as common to the industry, this can give assistance in establishing the location of the last open crosscut in this case. The above also applies to the term "outby."

The term "inby" is defined by the DMMRT, p. 527 as follows:

a. Toward the working face, or interior, of the mine; away from the shaft or entrance; *** b. In a direction toward the face of the entry from the point indicated as the base or starting point. c. The direction from a haulageway to a working face ***. d. Opposite of outby. [Emphasis added.]

The term "outby" is defined by the mining dictionary as follows:

a. Nearer to the shaft, and therefore away from the face toward the pit bottom or surface; toward the mine entrance. The opposite of inby. Also called outbyeside. B.C.I.; Fay. b. In a direction toward the mouth of the entry from the point indicated as the base or starting point.

The mining dictionary referred to above defines the term "face" in pertinent part as "the solid surface of the unbroken portion of the coalbed at the advancing end of the working place," "a point at which coal is being worked away," or "a working place from which coal or mineral is extracted."

In one of the earlier cases decided under the 1969 Act, the

former Board of Mine Operations Appeals defined the term "inby the last open crosscut" and in so doing affirmed a judge's ruling that it means "inby the interior-most rib or wall." In this case the term exterior rib line was defined to mean the line of the wall closest to the portal of the mine. Mid-Continent Coal and Coke Company, 1 IBMA 250 (December 29, 1972).

The face of F-Main South section was located a short distance south of crosscut 97+23 (Exh. GX-13). Inspector Jacobson testified that the last open crosscut for rooms 1 through 4 and 6 through 7 was crosscut 97+23. He further stated that he believed 96+23 was the last crosscut for room 5 as there was not an opening between rooms 4 and 5. (Tr. at 12).

I do not find this argument by Inspector Jacobson and the Secretary persuasive as to this issue. It is not consistent with the other rooms in this section of the mine. If the reason is that room 5 at 97+23 is only three sided, so is room 7, room 4 and 1. Yet, Jacobson has indicated on Exhibit GX-13 by drawing in blue dotted lines to show the outby edge of the last open cross cut as extending along 97+23. Only in room 5, does he distinguish this difference without other explanation than the cut was not made through between 4 and 5. I reject the Secretary's argument. The definitions of a crosscut indicates it is a passageway at right angles to the main entry, and being 97+23 is the last crosscut driven at right angles from the face of room 5, it is the last open crosscut at that location.

The Secretary further argued in his brief that great weight should be given to the Mining Enforcement and Safety Administration's Assistant Administrator's interpretation of 30 C.F.R. § 57.21-78 as contained in a memorandum dated November 8, 1974 and the testimony of Inspector Jacobson relative thereto (Sec. Br. at 4 and Exh. GX-13A). In this memorandum, the contention is that the last open crosscut is a return airway for ventilating air and only permissible equipment shall be allowed in or beyond the last open crosscut. This is because it is a place where flammable gasses are present or may enter the air current.

I do not find that this argument is valid. It is well settled that inspectors' guide lines and manuals do not have the status of official mandatory safety standards. See Kaiser Steel Corporation, 3 IBMA 489, (1974), King Knob Company, Inc., WEVA 79-360 (June 29, 1981). The "policy" statement instructing inspectors to cite equipment in the last open crosscut as it is a return airway is not consistent with the wording of the standard which refers to non-permissible equipment beyond the last open crosscut.

In this case the Secretary referred to the above memorandum and argued that the location where the cited equipment was observed was a return air flow (Sec. Br. at 5, 6). The most credible evidence of record does not support this argument. The facts

established that the ventilation system at this location in the mine, and as shown on Government's Exhibit GX-13, has fresh air traveling up room 5 towards the face. After sweeping the face, the return air is exhausted through vent tubing or ducts. There are six fans pulling the air through these ducts, one fan in room 1 and 7, and two fans in room 2, and 6 (Tr. at 16 and 55). There is no evidence that the cited pieces of equipment were in a return air course.

Petitioner further contends that the respondent had a recirculation problem in this section of the mine. The most credible evidence of record fails to support this claim. At the time the citations were issued, MSHA inspector Potter monitored methane in the immediate area and found there was none (Tr. 37). Jacobson testified to some reports and data regarding a recirculation problem at respondent's mine. However, this data referred to a period of time prior to the accident and another period of time two and half years after the citations were issued which is not shown to have been relevant or material to these citations.

Charles McLendon, respondent's chief engineer, who holds a degree in mining engineering, testified that he did not believe methane would accumulate at the intersection of room 5 and crosscut 96+23 for the reason that any methane at the face would be removed through the vents and the fans would prevent any recirculation (Tr. at 80-82). I find this testimony more credible than that of the inspector as it is based upon tests performed by the party responsible at the time for the ventilation system in the mine. The inspector's opinion was based upon outdated data and speculation.

In view of the foregoing findings and conclusions, I find the petitioner has failed to establish violations of section 57.21-78, as charged in citation Nos. 336643 and 336644, and order that these two citations are vacated and petitioner proposal for assessment of civil penalties dismissed.

Docket Nos. WEST 81-28-M and WEST 81-32-M

The above two cases are related as they involve the same alleged defective part in respondent's cited No. 16 man trip. In Docket No. WEST 81-28-M, MSHA inspector Merrill Wolford issued Citation No. 575827 on April 18, 1980 alleging several violations of 30 C.F.R. § 57.9-2 which standard provides as follows:

Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

In the citation, the inspector stated as follows:

The #16 mantrip has the idler steering control arm worn out. The flexible U joint to the steering gear has a

broken bolt and (sic) lose. The right front spring bracket is worn egg shaped. The accelerator pedal is missing. The brake lights are inoperative and (sic) only one taillight works. This vehicle was voluntarily taken out of service by Safety Engr. to be repaired (Exhibit GX-14).

In Docket No. WEST 81-32-M, inspector Wolford observed on May 9, 1980, respondent's No.16 mantrip operating in the F-28 panel and determined that the previously cited steering idler control arm ball joint had not been repaired. Wolford issued 104(b) ^{3/} Order No. 576844 in which he again alleged a violation of 30 C.F.R. § 57.9-2 and stated as follows:

Citation #0575827 was issued on the #16 mantrip for safety defects on 04-18-80 with a termination date of 1600 hrs. on 04-25-80. This mantrip was observed being used in F-28 panel on 05-09-80 still with a badly worn and (sic) loose steering idler control arm ball joint which could cause the driver to lose control. This vehicle is used to haul men and (sic) materials about 1 mile from the #2 shaft to the F-28 panel work area. This vehicle had been voluntarily taken out of service by the Safety Engr. to be repaired on 04-18-80. This vehicle is now ordered removed from service until properly repaired.

In Docket No. WEST 81-28-M, citation No. 575827, the petitioner proposed the assessment of a penalty in the amount of \$725.00. In WEST 81-32-M, petitioner filed a proposal for penalty alleging that citation 576843 was issued for a violation of 30 C.F.R. § 57.9-73 and proposed a penalty in the amount of \$1,200.00. Section 57.9-73 provides "Mandatory. Defective equipment, removed from service as unsafe to operate shall be tagged to prohibit further use until repairs are completed."

At the commencement of the hearing involving these two cases, the parties entered into a stipulation in which the respondent admitted all violations alleged in citation No. 575827 except for that which pertained to the subject ball joint. The respondent

3/ 104(b) provides in part as follows:

If, upon any follow-up inspection ... an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the time originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall ... promptly issue an order.

agreed to pay the proposed penalty of \$725.00 in settlement of all the other violations. It was further agreed by the respondent that if a violation was found regarding this ball joint, the penalty could be increased. As to WEST 81-32-M, order No. 576843, if a violation is found as to the subject ball joint, an additional penalty can be assessed in this case (Tr. at p. 6, 7, 8 and Resp's Br. at 2). Following the hearing the respondent submitted a brief. The Secretary decided to waive his right to submit a post hearing brief stating he would rely upon the arguments presented at the trial.

The threshold issue in this case is whether the ball joint in the idler steering control arm of the No. 16 mantrip was defective. If so, did it affect safety?

The No. 16 mantrip is a vehicle assembled from various automotive components for use in mines. The front end is from an International Scout II (Tr. at 70). The alleged defect cited in this vehicle is a part of the front end and specifically described as the worn condition of the ball joint of the idler steering control arm (Tr. at 13). The operation and function of the idler steering control arm is to attach the shaft of the steering assembly to the wheel of the mantrip so that the wheel turns when the steering wheel is operated. It was only the one ball joint of this assembly closest to the steering wheel alleged by the inspector to be defective (Tr. at 17, 18).

Inspector Wolford testified that when he observed the front end of the No. 16 mantrip on May 9, 1980, the ball joint lacked any dust cover or grease sealer, and that the grease fitting referred to as a "zerk" was missing. He observed that there was no lubrication in the joint (Tr. at 19 and Exhibit GX 15-B). Further, that the housing around the ball joint appeared worn in an egg shape and the nylon bushing material that was used as a liner had come out of the drag link housing (Tr. at 27, 28).

Wolford testified that the worn condition of the ball joint would affect steering of the vehicle and might under the right circumstances come apart or break. The No. 16 mantrip is used in the mine to haul eight to nine miners in and out of the working areas. It is also used to transport supplies. At the Alchem mine, the vehicle is used underground in confined areas over rough surfaces. A loss of control of the vehicle could cause it to go into a rib and roll over. The vehicle is not supposed to be operated at speeds of over 15 miles per hour and probably would not go over 25 miles per hour (Tr. at 33, 34).

An examination of the drag link was made on April 16, 1981 by Kazimir Niziol, a mining engineer with MSHA's Safety and Health Technology Center in Denver, Colorado. Niziol issued a written report in which he described the cited ball joint to be in very

poor condition with the grease fitting and dust cover missing and containing no trace of grease. He stated that the ball stud was extremely loose in all directions being approximately; 1/8 inch to 3/16 inch. Also the drag link was bent into an S shape. In this report Niziol stated his conclusions as follows:

The steering system of any vehicle is an important safety consideration. Any damage, deterioration or excessive wear to steering components is extremely dangerous. When such conditions are found to exist, the worn parts should be immediately replaced or the vehicle removed from service. Loose pins, ball joints or any other loose parts increase front wheel impact and also result in loss of control of the vehicle even at low speeds. The draglink examined exhibited such wear and was considered to be dangerous particularly since the vehicles operate underground in confined conditions and on rough surfaces. (Exh. GX-15).

The respondent argues that although MSHA proved the ball joint was loose, it did not show that it was a defect that in any way actually affected the safe operation of the mantrip (Resp's. Br. at 4). In support of this position, it points out that the inspector did not attempt to drive the mantrip or try the steering mechanism under operating conditions to determine if the wheels would "chatter" or the ball come out of the socket.

In support of respondent's position, William C. Adler, a foreman for Allied at the Alchem mine, testified he had driven the No. 16 mantrip during April and May, 1980, and that he had not experienced any problems with the steering (Tr. at 151). James N. Ingram, a civil engineer employed in Allied's reliability engineering department, testified that he had supervised tensile tests of the steering assembly ball joints conducted at the University of Wyoming in May 1981. Three ball joints were tested including the one cited here, a new ball joint, and one selected at random off of a similar mantrip. The conclusion was that the cited ball joint was essentially as strong in tensile strength as the others tested and did not fail until the application of 15,700 pounds (Tr. at 103 and Exh. R-3). Ingram also tested the amount of loads or pressure which would be required to cause failure of the other parts of the steering assembly rather than the base joint. He testified that the other parts would fail before the subject ball joint (Tr. at 73, 74 and 76-78).

I have carefully reviewed and considered the testimony, exhibits, and brief submitted in this case and conclude that there was an equipment defect involving the subject ball joint on the No. 16 mantrip.

This case presents a classic example of two experts presenting directly opposite views on the question at issue here. However,

the uncontroverted evidence establishes that the subject ball joint showed wear, was without a grease zerk, and lacked lubrication. The amount of movement of the ball in the socket and its transference to the wheels is disputed but its existence is not denied by the respondent. The fact that the joint was worn is admitted by respondent. However, it is argued that it was not proven that it was defective (Resp. Br. at 8).

The term defect is defined in Webster's Third New International Dictionary (1976 Ed.) at p. 591 as follows:

1. An irregularity in a surface or a structure that spoils appearance or causes weakness or failure;
2. want or absence of something necessary for completeness, perfection, or adequacy in form or functions.

As stated previously, I find from a careful review of all the evidence in this case that the subject ball joint was defective. Also, I am persuaded that the most credible evidence supports petitioner's argument that the defect to the ball joint in the steering mechanism could affect safety. Even assuming, that the mantrip does not travel over 15 miles per hour, as argued by the respondent, the fact remains that the vehicle is hauling eight to nine miners underground in a confined area over rough terrain where the steering mechanism of the vehicle is vital to stability and direction. I am not persuaded that the tensil tests performed on the ball joint as reported by James Ingram would reflect the danger that exists from the ball joints condition as described by all the parties. The tensil strength would determine the metals ability to withstand certain forces. However, the looseness in the steering and the deterioration of the ball joint from lack of lubrication seem to me to be vital in this case.

Respondent has cited the case of Medusa Cement Co., 1 MSHRC 2454, (May 1980)(ALJ), in support of its position in this case. I find that there is a distinction between the facts of these two cases which effect the final conclusion. In the Medusa case, supra, the Judge found that the defect, a broken bushing, would not adversely affect the control of the grader involved and render it unsafe to operate. Further, there was only the one miner, the operator, exposed to any risk. It is also noted that in Medusa, the Judge distinguished his facts from those in Phelps Dodge Corporation, 1 FMSHRC 2018 (Dec. 1979)(ALJ) wherein Judge Merlin decided that a violation of 55.9-2 occurred when a truck was not safe when it was found all the lugs on a wheel were loose. The distinction here is whether the equipment defect would affect safety and based upon two different fact situations, a different conclusion was reached.

In light of the stipulation entered by the parties regarding Docket No. WEST 81-28-M, I find that the penalty already agreed upon in the amount of \$725.00 should be raised by the amount of

\$75.00 for the violation of a defective ball joint making a total penalty to be \$800.00.

Docket No. WEST 81-32-M

As stated at the beginning, the parties agreed that if I should find a defective ball joint in the prior case affecting safety, an additional penalty may be assessed for the violation alleged in citation No. 576843. I find that the evidence shows the respondent was negligent in failing to repair the defective ball joint after it had been cited under citation No. 575827. The citation read that the respondent had voluntarily taken the equipment out of service by the respondent's safety engineer to have it repaired (Ex. GX-14). The evidence of record shows that all the other defective parts were repaired but the ball joint was not repaired which subsequently required the vehicle to return to the shop several times for mechanical work (Exhibits GX-15, F and G). These complaints all related to the steering mechanism. Upon the inspector's return approximately two weeks later, the repair work was still not accomplished.

I am not persuaded that a penalty of the size originally proposed by the Secretary is warranted in this case. The facts suggest that the respondent did not determine that replacement of the part was necessary. It would appear that the defect was not corrected because of a failure of communication and not through an attitude of defiance.

I find that a penalty of \$100.00 is appropriate in this case.

Docket No. WEST 81-332-M

Petitioner alleges respondent violated 30 C.F.R. § 57.9-2 which standard provides:

Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

On October 9, 1980, MSHA inspector David Anspach conducted an investigation following an accident at the Alchem mine and issued a 104(a) type citation No. 337557 which included the following statement:

A 400 gal. oil tank that was being towed in GME roadway broke loose and struck a man that was standing in front of a lube truck. The retaining pin between the towing bar and the 400 gal. tank came loose releasing the tank. The tank equipped with 4 fixed wheels continued on the roadway striking a man between the tank and a stopped lube truck (Exh. GX-17).

Following a hearing in Green River, Wyoming, the parties submitted post hearing briefs.

Issue

The specific issue in this case is whether there was a defect in the tow bar connecting the 400 gallon tank trailer to the tractor before the equipment was used. If so, then a determination must be made as to the amount of the penalty to be assessed the respondent.

Discussion

The facts in this case are not in dispute. The vehicles involved in this accident were a 400 gallon hydraulic oil tank being towed by a Ford forklift tractor. The location of the equipment was in an underground roadway of the Alchem mine. The tractor was connected to the trailer by a tow bar that was in the shape of an A with the point or narrow part of the tow bar attached to the tractor by a pin that dropped through two braces on the body of the vehicle. The wider part of the tow bar fit over a tube of steel attached to the trailer through which was inserted a pin. A cotter pin was to be inserted in the end of the pin so that the pin would not slip out (Tr. at 11, 12 and Exh. GX-19, 20). As the tractor was pulling the tank along the underground roadway, the tow bar came loose and the tank continued along pinning a miner between the tank and a lube truck (Tr. at 12 and Exh. GX-21). The reason the tow bar came loose in this instance was because the cotter pin was missing. Why the pin was missing is not established in this case.

Respondent contends that in order to prove a violation of standard 57.9-2, petitioner must prove that there was a defect affecting safety which must have existed before equipment was used. In this case, respondent argues that the defect was not proven.

MSHA inspector Anspach testified that the reason the citation was issued was that the cotter pin dropped out of the tow bar. However, under questioning, Anspach testified as follows:

Q. Could you explain to us why you checked the box there under condition or practice that says, "could not have been known and predicted or cured due to circumstances beyond the operator's control?"

A. This was as a result of that key coming out of there. I don't think there was any way they could predict when that key will come out of there, or when that could come out of there. The reference is to the key, to the cotter pin.

Q. I see.

In this case, we do not have a situation where the inspector who issued the citation claims that the equipment was defective before it was put in use. He admitted under cross examination that it was unknown whether the cotter pin was in or out when the equipment was operated and testified as follows: "as far as that particular pin missing I don't believe they were negligent. What I'm saying is if they looked at it and it was missing I don't know" (Tr. at 20). Also, he answered a question put to him as follows:

Q. And with respect to the safety chain and whatever -- and the failure to have safety chains or welding devices you said the company should have perhaps found that, but your not asserting that for purposes of the violation of 9-2.

A. No. This is after the fact (Tr. at 21).

I find from the evidence of record and particularly the testimony of the inspector that the violation of 57.9-2 was not proven and particularly that part relating to defects in equipment being known before it is put in use. The proposal for a civil penalty should be dismissed. See Grove Stone and Sand Company, 2 FMSHRC 1263 (May 1980)(ALJ).

Petitioner argued that several Commission decisions uphold their position in this case that the respondent violated 57.9-2. I disagree. In Secretary v. Ideal Basic Industries, 3 FMSHRC 843, the Commission considered a piece of equipment put in use with a known defect even though it was alleged the defect was not used. In the instant case, it was never proven that anyone knew of a defect when the equipment was put in use. In Secretary v. Allied Chemical Corp., 4 FMSHRC 503 (March 1982)(ALJ), Judge Morris found that there were defects existing when the machine was put in use. That is a different situation than is being considered in the case at issue here. Similarly, the same was true in Secretary v. Raid Quarries, 4 FMSHRC 728, (1982)(ALJ).

Docket No. WEST 81-332-M is hereby dismissed.

Docket No. WEST 81-405-M

Petitioner alleges respondent violated 30 C.F.R. § 57.21-33. The cited standard provides as follows:

Mandatory. The volume and velocity of the current of air coursed through all active areas shall be sufficient to dilute, render harmless, and carry away methane, smoke, fumes, and dust.

During a regular inspection of the Alchem mine Inspector Martin B. Kovick issued Citation No. 577485 stating in the condition and practice section as follows:

In the H.M.S. underground shop, there is not enough air movement to carry away smoke and fumes. There was not enough air to turn an anemometer approximately 4-5 feet from the fan. There is not enough air movement to take a smoke tube reading approximately 4-5 ft from the fan. The whole shop area was filled with what appeared to be smoke fumes and dust. There are approximately four to six men working in the shop and under these conditions. It is apparent that ventilation is not adequate to carry toxic fumes etc. to the return airway.

Issue

Was the volume and velocity of the current of air in the H.M.S. shop sufficient to dilute, render harmless, and carry away fumes and dust?

DISCUSSION

The facts in this case show that on June 17, 1981, MSHA inspector Kovick conducted a regular inspection at respondent's Alchem mine. While underground at the H. Main South shop area, he observed a man using an arc welder to weld on a piece of mining equipment. Kovick testified that he saw blue smoke and haze "hanging" in the shop area. He considered it an excessive amount of smoke and haze (Tr. at 11). At this time the inspector attempted to test the air flow in room 3 with an anemometer but there was not enough air to turn the testing device. He then performed several smoke tube tests. This is done by squeezing off a puff of smoke and measuring the speed of its travel over a distance of ten feet to determine the air flow. Kovick stated that instead of traveling ten feet, the smoke in this case drifted to the ceiling (Tr. at 12). The smoke tube tests were performed also approximately 30 feet from the ventilation exhaust fans (Tr. at 16). The only way that the smoke would go through the ventilation fan was by sticking the tube approximately 4 to 5 inches from the fan (Tr. at 17).. Further tests were conducted and resulted in similar results in rooms 4, and 5 in the H.M.S. shop area (Exh. GX-23). The inspector testified that he was in the shop area for an hour and that he began to feel nauseous from the fumes (Tr. at 24).

Inspector Kovick also conducted two "cricket" tests which is used to obtain air samples for an analysis of gases such as methane, carbon dioxide, and other gases. The report on this test was relatively neutral for the above gases but the inspector failed to request a report for gases given off by welding (Tr. at 37).

Two hours after the inspection in which citation No. 577485 was issued, Jack Thorner, safety engineer and Don Schwartzberg, mining engineer for respondent, conducted ventilation tests in the H.M.S. shop area. They were also unable to get an anemometer reading (Tr. at 102). They conducted smoke tests in rooms 3 and 4 and concluded that the cubic feet per minute (CFM) of air movement was 9100 and 5050 respectively. Schwartzberg believed that quantity of air was sufficient for removal of fumes from the shop area (Tr. at 104).

Respondent argues that petitioner has failed to prove that the air movement in the shop area was insufficient to dilute, render harmless and carry away fumes and that the fumes were harmless. This is based upon the testimony of Thorner that at the time of the inspection, he thought the shop seemed clear, except for some smoke in the pockets in the back (ceiling). Further, respondent contends that the results of Kovick's tests were inaccurate. First, that only one test was taken in each room and that they were taken approximately 20 to 30 feet from the stopping which would render them inaccurate as stoppings cause the air flow to eddy (Resp. Br. at 7 and 8).

After a careful review of all of the evidence and arguments in this case, I conclude that the most credible evidence substantiates the fact that a violation of standard 57.21-33 did occur. There was considerable evidence presented by respondent in this case regarding velocity of air and whether or not the fumes were harmful. I find that the various arguments, although well presented, misses the mark as far as interpretation of the standard violated here. The standard 57.21-33 requires that the volume and velocity of the air through the working area be sufficient to dilute, render harmless and carry away methane, smoke, fumes, and dust. In light of the foregoing and the plain language of the standard, I find that the air moving through the shop was not adequate to remove the smoke and fumes that had accumulated. There was no disagreement between the parties that on the day of the inspection, welding was being performed in the H.M.S. shop area. There is a difference of opinion as to the amount of smoke, haze, and fumes that existed in this area when the inspection party arrived. Under all circumstances, I find the testimony of Inspector Kovick more credible on this point than that of respondent's witnesses. He testified that when they entered the shop area you could see the blue smoke and haze hanging in the shop area and it appeared to him to be an excessive amount (Tr. at 11). Jeff Sawyer, respondent's maintenance foreman, said it was normal to have a little smoke in

pockets in the top (Tr. at 67). I do not find Sawyer's testimony persuasive as it was his area of responsibility where the citation was issued. Jack Thorner, safety engineer, also testified that he was along with the inspection party and that he thought the room cited seemed clear to him except for pockets of blue smoke close to the back. Although there is conflicting testimony as to the degree of smoke in the shop, I believe the inspector's testimony is more credible on this point.

The evidence shows that when the inspection party entered the shop area, two of the exhaust fans were turned off, one in room 3 where the welding was being performed and another in room 4. Thorner, confirmed this and stated that he did not know why these fans were off (Tr. at 87, 88). Sawyer had testified that the men in the shop had been welding on a Joffrey Miner in room 3 all day (Tr. at 71). Based upon these facts, it is reasonable to conclude that there would be smoke, fumes, and haze from the welding and if the fans were off, it would not provide adequate air movement to remove the contaminants from the area. The lack of movement of smoke from the inspector's smoke bomb confirms this.

The standard cited refers to methane, smoke, fumes, and dust. It doesn't explicitly require that a determination be made as to how toxic these are. Therefore, I reject respondent's argument that the petitioner failed to prove the fumes were harmful. It is sufficient to show that there was either smoke or fumes in the area. Further, the evidence established that the smoke and fumes were a result of the arc welding that was being performed in the area. Further Kovick and inspector Jacobson testified to the fact that significant hazards are associated with fumes occurring from welding (Tr. at 59-64). This was uncontroverted by respondent's witnesses.

In view of the above, I find a violation by respondent of standard 57.21-33 as alleged in citation No. 577485. I find the respondent knew of the violation as members of management had been present in the area. Also, the fact that exhaust fans were turned off during the welding in the area is evidence of negligence. The gravity is serious as the effect of smoke and fumes on miners working in the area can be injurious to their safety and health when inhaled over a period of time. The respondent demonstrated good faith in abating this violation by installing regulators in the stoppings to replace the exhaust fans. I find that \$140.00 is an appropriate penalty in this case.

CONCLUSION OF LAW

Based upon the entire record in these consolidated cases including the stipulations of the parties and upon the factual determinations reached in the narrative portions of this decision, it is concluded:

1. That the Commission has jurisdiction to decide these seven cases.

1. Docket No. WEST 80-217-M

Based upon motion of the petitioner, and order approving same, WEST No. 80-217-M which included Citation No. 575879 is dismissed.

2. Docket No. WEST 80-292-M

Based upon the stipulation of settlement entered into between the parties, the following agreed settlements for the designated citations are approved as follows:

	<u>Approved Penalty</u>
Citation No. 336642A	\$2,500.00
Citation No. 336642B	<u>2,500.00</u>
Total Penalty	\$5,000.00

3. Docket No. WEST 80-299-M

The most credible evidence establishes that petitioner failed to prove by a preponderance of the evidence in citation Nos. 336643 and 336644 a violation of 30 C.F.R. § 57.21-78 and that this case is dismissed.

4. Docket No. WEST 81-28-M and WEST 81-32-M

In WEST 81-28-M, citation No. 575877, the evidence shows that respondent violated 30 C.F.R. § 57.9-2 by allowing a piece of equipment containing defects affecting safety to be used. An appropriate penalty is \$800.00. In WEST 81-32-M, citation No. 576843, the evidence shows that respondent failed to remove equipment from service after being cited in violation of 30 C.F.R. § 57.9-2. An appropriate penalty in this case is \$100.00.

5. Docket No. WEST 81-332-M

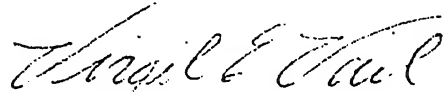
The credible evidence establishes that petitioner failed to prove by a preponderance of the evidence that a violation of 30 C.F.R. § 57.9-2 occurred warranting the issuance of citation No. 337557. The facts did not prove that respondent knew of a defect in the equipment being cited in this case before it was put in service and WEST 81-332-M is dismissed.

6. Docket No. WEST 81-405-M

Citation No. 577485, issued in this case and alleging a violation of 30 C.F.R. § 57.21-33 is affirmed. It is determined that an appropriate penalty in this case is \$140.00.

ORDER

Accordingly, based upon the foregoing findings of fact and conclusions of law, the respondent is ordered to pay the total sum of \$6,040.00 within forty days of this decision.



Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAR 6 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-73
Petitioner	:	A.C. No. 02-00533-03503
	:	
v.	:	Black Mesa Mine
	:	
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco,
California,
for Petitioner;
Michael O. McKown, Esq., Peabody Coal Company,
St. Louis, Missouri,
for Respondent.

Before: Judge Morris

This case, heard under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), arose from an inspection in November, 1982 of the Black Mesa surface coal mine of Peabody Coal Company. The Secretary of Labor seeks civil penalties because respondent allegedly violated two safety regulations adopted under the authority of the Act.

After notice to the parties, an expedited hearing was held in Phoenix, Arizona on December 13, 1983. Respondent's request for an expedited decision, made at the hearing, was granted.

Both parties filed post trial briefs.

Stipulation

The parties stipulated that Peabody is a large company with a moderate history. The company abated the alleged violation in good faith. Further, the imposition of a civil penalty will not affect the company's ability to stay in business (Tr. 5).

Citation 2006837

In this citation the Secretary of Labor seeks a civil penalty of \$2,000 because respondent failed to provide a berm on its elevated roadway thereby violating the mandatory standard published at 30 C.F.R. § 77.1605(k), which provides:

(k) Berms or guards shall be provided on the outer bank of elevated roadways.

Issues

The issues are whether berms are to be provided at the edge of a 130 foot bench in the working pit of a multiple seam surface coal mine; further, a secondary issue is whether the diminution of safety doctrine is viable. If a violation exists then an issue is presented as to what penalty is appropriate.

Summary of the Evidence

The facts surrounding the death of dozer operator Cecil Yazzie are basically uncontroverted.

Petitioner's evidence, in the main, addresses the details of the accident. Respondent's evidence generally addresses the operation of its surface coal mine. A sketch, in Exhibit Pl, illustrates the location of the highwall, the coal seam, the path of Yazzie's dozer, the keyway and the spoil pile.

William G. Denning testified for MSHA: In November 1982 MSHA Inspector Denning investigated a fatal accident that had occurred in the J1-N6 pit at respondent's Black Mesa coal mine (Tr. 7, 10, 11, Exhibit Pl). His investigation established that on November 5, 1982, at the commencement of the shift, at 4 p.m., dozer operator Cecil Yazzie met his supervisor, Moreo, in the pit area. Moreo drove Yazzie through the pit from the coal face on the Blue seam coal bench to ramp C. Moreo instructed Yazzie in his work. His duties included leveling the shot coal from the previous shifts, making ramps up the coal face, and building portions of ramp C. (Exhibit Pl).

After leveling the shot coal Yazzie proceeded to Ramp C and began working at that location. At about 11:30 p.m. Yazzie, Moreo and Ralph Charlie (shooter/blaster) were located near the bottom of Ramp C, preparing to set off a coal shot on the Blue coal seam. Yazzie's dozer, parked on the ramp, was used for protection from the blast. After a delay the shot was set off. Moreo found no misfires and he left the coal bench. While he was leaving the pit Moreo passed Yazzie who was starting to tram his dozer from Ramp C through the pit to the carry-all bus at Ramp E. Moreo continued out of the pit and stopped for a few minutes to

talk to the coal loader operators. He then proceeded to Ramp E. After arriving at Ramp E, Moreo became concerned because he could not find Yazzie. Moreo traveled to the coal face on the Blue seam and, after a brief inspection, he observed Yazzie's upset dozer in the keyway near Ramp C. (Tr. 13, Exhibit P1). Moreo, who was also an Emergency Medical Technician, and others could not revive Yazzie (Exhibit P1).

The keyway, or ditch, is an area excavated by the dragline along the seam coal bench. It was 31 feet to the bottom of the keyway. At the time of the accident the keyway extended from Ramp C approximately 600 feet toward Ramp E.

The inspector's investigation further established that, after leaving Ramp C, Yazzie's dozer traveled in a path at a slight angle away from the keyway. After traveling approximately 75 feet Yazzie made a correction toward the keyway. He made another slight correction when 40 feet from it but he continued in the general direction of the keyway. After the second change in direction he traveled approximately 35 feet before toppling off the coal bench into the keyway. At that point his dozer was at the edge of the coal shot (Exhibit P1).

The dozer tread marks for the final 35 feet indicate the dozer was still tramping forward at the time of the accident. It appeared that the outer edge of the coal bench collapsed under the dozer, causing it to roll sideways off of the bench (Exhibit P1).

The dozer fell about 31 feet, impacting on the top edge of the rollover protective structure. Yazzie remained inside the operator's cab; however, it appeared he was not wearing the seat belt that was provided (Exhibit P1).

After the coal shot and before this accident occurred the dragline had resumed operations. While digging, the dragline's lights illuminated the pit and accident area; however, as the dragline spoiled, it swung away from the pit, leaving the area relatively dark. This change from light to dark could have affected Yazzie's perception. Also while spoiling, the dragline created dust in the pit that could have affected visibility. (Exhibit P1).

Yazzie was normally assigned to work at the J-7 pit area. He worked in the J-1 pit only when needed. A keyway, as excavated in the J-1 pit, is sometimes, but not always, present in the J-7 pit. The unexplained changes in the direction of the dozer could have been made by Yazzie in order to tram the dozer around the shot coal. Since Yazzie was newly assigned to the J-1 pit he may have forgotten about the keyway being adjacent to the shot coal and trammed the dozer into it (Exhibit P1).

As a result of its investigation MSHA concluded that the accident occurred due to Yazzie turning the dozer and tramping it toward the keyway. The lack of a berm along the outer edge of the elevated Blue seam coal bench contributed to prevent travel into the keyway. MSHA could not determine the reason why Yazzie turned the dozer toward the keyway. In MSHA's opinion a contributing factor to the fatality was Yazzie's failure to wear the seat belt provided in the dozer (Exhibit P1).

MSHA's inspection manual contains guidelines construing the berm standard. The manual states:

The requirements of Section 77.1605(k) apply to that part of an elevated haulage road where one bank is, or both banks are, unprotected by a natural barrier which will prevent vehicles or equipment from running off and rolling down the unprotected bank or banks.

"Elevated roadways", as used in this requirement, are roadways of sufficient height above the adjacent terrain to create a hazard in the event mobile equipment ran (sic) off the roadway.

"Berm" as used in this requirement means a pile or mound of material at least axle high to the largest piece of equipment using such roadway, and as wide at the base as the normal angle of repose provides. Where guard rails are used in lieu of berms, they shall be of substantial construction.

The width of the haulage road does not preclude the need for berms or guard rails.

(Exhibit P8).

In December 1981, in response to questions concerning the berm standard, the administrator for coal mine safety and health issued MSHA's policy memorandum 81-40C. The administrator, on behalf of MSHA, stated in part as follows:

Section 77.1605(k), 30 CFR 77, is applicable to all elevated roadways on mine property, including roads used to transport coal, equipment, or personnel, and regardless of the size, location, or characterization of the roadways. Berms or guards are required on all exposed banks of elevated roadways. Thus, elevated roadways with two exposed banks are required to have berms or guards on both sides.

(Exhibit P7).

At the time of the accident the dragline had exposed the Blue coal seam. Two ramps were being used for access to the pit area (Tr. 12, 13, Exhibit P1).

In the inspector's opinion a berm should have been placed from the point where Ramp C intersected the Blue coal seam bench back towards Ramp E, a distance of about 600 feet (Tr. 22). The inspector considered the bench a roadway because the same type of equipment uses the coal bench and the haul roads (Tr. 23).

Surface changes occur in the mine as mining progresses from one seam to another but there is always a bench in the coal pit used for a travelway (Tr. 23).

The MSHA surface inspection manual (Exhibit P8, pages 336, 337) and the MSHA policy memorandum define an elevated roadway. These definitions are applicable to respondent's work place (Tr. 24-26, 61). The inspector relied on the policy memorandum in forming an interpretation of what constitutes a roadway (Tr. 43). A roadway is a travelway used to transport equipment, personnel and coal (Tr. 43, 44, 61). The inspector would not consider a surge pile to be a roadway (Tr. 49, 50).

In the inspector's opinion there are some "gray areas" as to what constitutes a roadway; in addition, an inspector has a degree of judgment as to the citations he can issue (Tr. 50, 51).

The lack of a berm, as here, presents a hazard to a miner such as Yazzie (Tr. 26). A berm can either stop a vehicle, redirect it, or warn an operator that he is in close proximity to the edge (Tr. 27, 39, 40).

In the inspector's opinion a berm would not be necessary if the dozer was cleaning the coal or pushing dirt off of the edge of the bench (Tr. 50).

Respondent's Evidence

Buck Woodward, Tracy Northington, Alan Cook, Don Holt, Rick Contratto and Joe Johnson testified for respondent.

At the Black Mesa mine respondent uses a multiple seam mining process for its five seams of coal (Tr. 70-72). The company uses a color coding system to differentiate between its coal seams (Tr. 71). These seams are respectively designated, from the surface down, as green, blue, red, bottom red, and yellow (Tr. 71, Exhibit F).

The coal bench is the area where the dragline and other pieces of mining equipment are located. The highwall is the face left by the dragline and the stripping equipment (Tr. 71; for a cross section view see Exhibit B).

Black Mesa uses a Marion 8750 dragline to first cut a keyway or ditch (Tr. 71-73). A drill crew then drills through the

overburden to the first coal seam (Tr. 73). The dragline removes the drilled and shot overburden by depositing it in an area that has already been mined (for an illustration of the pit configuration see Exhibit C).

The pit highwall results when the overburden is removed. The removal of the overburden also exposes the coal seam which is, in turn, drilled and shot. Shovels and other equipment load the coal onto trucks (for an illustration of the coal loading operation see Exhibit D).

The mining sequence continues as the dragline removes the coal. Drilling, shooting, and loading activities follow behind the dragline (Tr. 74). The dragline, using the wide radius of its shovel, spoils the overburden and later the parting ^{1/} into a pit where the coal has already been removed (Tr. 74).

In the J1-N6 pit the bench is 130 feet wide. Respondent tries to maintain that distance but it narrows slightly at the bottom coal seam (Tr. 15).

As a result of this citation MSHA requires a berm when the topmost (green) coal seam is exposed. The berm must be installed prior to any shooting. The berm is approximately six feet high and sixteen and one half feet wide at the base (Tr. 77). This berm must later be pushed off so the crews can shoot the coal beneath it.

MSHA also requires a third berm on the parting between the second and third seams (blue and green seams). This berm must, in its turn, be pushed off so the drilling crews can fragment the area beneath it. The dragline, in turn, removes the parting (Tr. 79).

The construction and removal of the berms continues as the mining progresses. The progression is both downward as the coal seams are exposed and removed and laterally as the dragline, shooters, and auxiliary equipment remove the coal or the parting (Tr. 79-80). In this mining progression 12 berms must be constructed and removed (Tr. 80).

The pit, designated as J1-N6, is the working pit of an active surface coal mine. Haulage trucks and loader crews are actively engaged in the coal removal. The haulage trucks, 16 feet 8 inches wide, primarily drive down the middle of the bench,

^{1/} Parting is the interburden between coal seams.

or a bit to the highwall side (Tr. 82). In the pit there is one direction of traffic. Once the trucks reach the ramp they go out of the pit area until they reach a permanent haulage road. The trucks then travel to a preparation site (Tr. 88).

In the opinion of respondent's engineer an active pit area is not a roadway. One reason is that the area changes daily. Haul roads at mines are designed to certain specifications and they take into consideration the speed of vehicles using them. Also the drainage of a haul road is a factor to be evaluated (Tr. 82, 83).

Respondent uses track type and a rubber tired dozer to emplace its berms. When necessary dump trucks haul in material to construct the berms. (Tr. 81).

Berms, such as MSHA requires here, are not required at any other mine in the west (Tr. 84).

In the opinion of respondent's engineer a berm in place here would not have prevented the accident. Yazzie was entering the coal shot area and his duties would have required that he level the area (Tr. 84).

Respondent's industrial engineer conducted a time and motion study relating to the installation and removal of berms (Tr. 97). A videotape (Exhibit U) shows the building of a berm with respondent's Clark 380 rubber tired dozer (Tr. 98-100). The front portion of the dozer goes out over the edge of the bench when building and even more so when removing the berms (Tr. 98-102). In building a six foot high berm the average dozer cycle ^{2/} is .47 minutes.

Normally berms are built during the third shift, from midnight until 8 a.m. (Tr. 101). Northington has monitored over 4000 dozer cycles.

When berms must be built at the edge of parting seams then material must be hauled in to construct the berms since there is no loose material available. Respondent estimates that, on an annual basis, it has hauled in 150,000 yards of material, about 2,000 truck loads, to build such berms (Tr. 104).

In removing the berms the dozer operator, whose vision is blocked by his equipment, goes right to the edge. Some operators have stated this was unsafe (Tr. 105).

2/ A cycle is the elapsed time from when the dozer starts forward, reverses its motion, and again starts forward (Tr. 99, 100).

Trucks in the pit never operate closer than within 80 to 100 feet of the edge of the bench (Tr. 106).

Respondent submitted a time and motion study comparing the "before and after" exposure of its men and equipment in abating this citation. All calculations were made on an annual basis (Tr. 107, Exhibits V, W, X).

Before the issuance of this citation respondent's activities resulted in its miners and equipment being exposed to the hazard of being within 20 feet of the parting ditch edge for 1,085.8 hours. This exposure was primarily the time required to drill in the 20 foot zone next to the edge of the ditch. This exposure is still incurred because it is still necessary to drill and remove the coal in the 20 foot zone (Tr. 108). But the exposure in this zone is now increased to 1,880.6 hours. This 73 percent increase results from the construction and removal of the berms now required by MSHA (Tr. 109, Exhibit X).

Before the berms were required the only dozer exposure to the ditch edge occurred during the cleaning of the coal. This was for 40.48 hours (Tr. 109, Exhibit W). As a result of abating the citation the exposure is now 831.5 hours, an increase of 1954 percent.

In removing the coal, respondent's rubber tired dozer cuts a 14 foot swath and approaches the edge 7,619 times (Tr. 109, Exhibit V). Since respondent is now building and removing berms there are 103,451 cycles to the ditch edge, an increase of 1,612 percent (Tr. 109-110, Exhibit V). Respondent has constructed 58 miles of berms to abate this citation (Tr. 115, 116).

Respondent puts berms on active haul roads where there is vehicular traffic traveling "at a good speed" (Tr. 125).

In the opinion of mine superintendent Joe Johnson the standard does not apply to the working area of the pit. The company is constantly mining this area. MSHA has never previously cited respondent for failure to have berms in an active pit area. But the company has been cited due to an eroded berm on a haul road (Tr. 151, 154, 155).

Don Holt, respondent's safety director for its mines in Kentucky and Ohio, is familiar with MSHA regulations 1605(k). In Holt's opinion the purpose of the regulation is to provide a guide on a haul road to keep vehicles within a confined area. Further, in Holt's opinion, the section does not apply to the working pit of surface mines (Tr. 132-134).

In the mines in the eastern portions of the United States

the working pits are 45 to 80 feet wide. It would practically shut down such mines if MSHA requires berms as it does here. MSHA does not now require berms in other active working pits. (Tr. 136, 137).

Discussion

Respondent's post trial brief asserts that the term "elevated roadway" does not include active work areas within the pit of a surface mine; that MSHA's reliance on its policy memorandum and its Surface Inspection Manual are misplaced; that there are profound differences between a roadway and a working pit bench; that as defined by a recognized treaties and a Bureau of Mines report a pit bench is not a roadway; that the failure to enforce this regulation elsewhere points out its vagueness and lack of clarity, that the Penn Allegh doctrine is not controlling; that all of respondent's witnesses and a time study confirm the extent of an additional hazard created by MSHA's erroneous interpretation of the regulation; that the emplacement of a berm would not have prevented Yazzie's accident; that MSHA failed to present the inspector who wrote the citation and failed to offer the citation in evidence; that MSHA's interpretation would shut down the surface coal mines in the United States.

The post trial briefs filed in this case do not cite the Commission decision of El Paso Rock Quarries, Inc., 4 FMSHRC 35 (1981). In El Paso Rock the Commission considered whether a violation of a berm standard occurred. The Commission held that a "bench" ^{3/} in a quarry is an "elevated roadway" within the meaning of the standard. In El Paso Rock the bench where the trucks operated were 40 feet above a lower bench. Berms were required.

The standard in contest here, 30 C.F.R. § 77.1605(k), applies to surface coal mines, including open pit and auger mines" 30 C.F.R. § 77.1. The standard in El Paso Rock, 30 C.F.R.

3/ In El Paso the Commission, in footnote 7, stated:

The term "bench" is in part defined by a A Dictionary of Mining, Mineral, and Related Terms, Department of the Interior (1968), as:

A ledge, which, in open-pit mines and quarries, forms a single level of operation above which mineral or waste materials are excavated from a continuous bank of bench face. The mineral or waste is removed in successive layers, each of which is a bench, several of which may be in operation simultaneously in different parts of, and at different elevations in an open-pit mine or quarry.

§ 55.9-22, was applicable to metal and non-metallic open pit mines, 30 C.F.R. § 55.1. But since the wording in each standard is exactly the same I consider El Paso Rock to be binding precedent.

Respondent initially asserts that the berm regulation does not encompass an active work area within the pit of a surface mine. In its rationale respondent cites the testimony of MSHA's only witness, William Denning. Respondent argues that his testimony is vague and inconclusive. It cites his testimony that a coal bench seam is a roadway "because the same type of equipment that used the bench also used the haulage system in the mine" (Tr. 22-24). Then respondent cites Denning's cross examination where he admits that "elevated roadway" is not defined in 30 C.F.R. Part 77 (Tr. 61). And in arriving at his conclusion the inspector relies on the Inspection Manual and MSHA's policy statement (Tr. 61, Exhibits P7, P8).

Respondent may argue that the evidence is inconclusive but basically the evidence is uncontroverted. Respondent's haulage trucks operated on the coal seam bench. The bench was 30 feet above the adjacent keyway. There were no berms. The foregoing were the circumstances prohibited in El Paso Rock. There appears to be no difference between a coal bench and a quarry bench.

Respondent contends that the MSHA Surface Inspection Manual and the policy statement (P7 and P8) are not binding on the Commission. I agree. Further, I do not rely on those exhibits. The documents fail to define a roadway. They assume a roadway exists; therefore, when it does, it must be bermed. For example, the inspection manual states that 1605(k) applies to ... "an elevated haulage road"; "Elevated roadways ... are roadways", "the width of a haulage road." Further, the policy statement indicates 1605(k) applies to "all elevated roadways." For example, "Berms ... are required on ... elevated roadways.... elevated roadways with two exposed banks", etc.

Respondent argues that the berm regulation does not apply because of the profound differences between a coal bench and a roadway. The most striking difference is that coal is removed from the coal pit. The removal is daily, even hourly (Tr. 155). All of the equipment including draglines, dozers, trucks and the like are engaged in this task (Tr. 82-83). Obviously, coal is not extracted from a haul road (Tr. 39).

MSHA's witness Denning indicated that the nature of the traffic is one of the factors to be considered before issuing a citation in this "gray area" (Tr. 35, 36, 54). One of the traffic features revolves on the speed of the equipment: In the pit the vehicles do not travel much more than five miles per hour. But a haul truck on a level road could reach 30 to 40 miles per hour. (Tr. 35, 36, 54). Respondent's evidence, confirmed by MSHA's

witness Denning, establishes that the Mudd Series on Surface Mining defines a haul road as "a road built to carry heavily loaded trucks at a good speed" (Tr. 37). Respondent contends that this obviously excludes a coal bench. Further, the type and character of the traffic is substantially different. The draglines, the loaders, the dozers, and the haul trucks are essentially congregated in the pit. The nature of this traffic in the pit is, by virtue of its continuing activities, substantially different from the traffic on the haul road.

The evidence here shows that the bench was 130 to 140 feet wide (Tr. 20, 116). The inspector assumed "the haulage truck drove down the middle of the coal seam" (Tr. 48). On this basis the 18 foot wide haul trucks would be no closer than 65 to 70 feet from the edge of the bench (Tr. 46, 47). Or, as the inspector stated, "If traveling down the middle the trucks would be 60 feet from the edge" (Tr. 46, 47). In short, on the facts no vehicles were closer than 60 feet of the edge of the bench.

On the foregoing facts, I would rule that the coal bench is not a roadway and I would vacate the citation. But the mandate in El Paso Rock is explicit: "Under the facts of this case, the quarry bench where the haulage trucks were driven is indeed an elevated roadway within the meaning of section 56.9-22", 3 FMSHRC at 36.

The El Paso Rock case was originally heard by Commission Judge Charles C. Moore, Jr., 1 FMSHRC 2046 (1979). The trial judge's decision does not indicate how close El Paso's trucks were operated to the edge of the bench. However, I lack the authority to carve an exception to the Commission decision.

Respondent in its brief cites a report published by the Bureau of Mines stating "Barriers should be used only in areas such as a very heavily, traveled, permit haul road." (Tr. 63-64). MSHA's witness only identified this as a statement in a book. On this minimal authentication I give such evidence zero weight.

In support of its argument that the regulation is vague and lacks clarity respondent cites the failure of MSHA to previously enforce the regulation at this site and elsewhere as to a coal seam bench.

The foregoing position is basically a plea in estoppel. But it is well established that estoppel does not apply against the federal government. King Knob Coal Company, 3 FMSHRC 1417, 1421.

Respondent argues that its time study (witness Northington) and its video tape (Exhibit U) are not offered to prove that MSHA's enforcement of § 77.1605(k) diminishes safety or causes a greater hazard. But it argues that if MSHA interprets the regulation in such a way that dangers are increased then that

interpretation is not correct. In short, respondent agrees that berms on an elevated roadway increase safety. But a coal bench is not a roadway and if MSHA interprets it to be so then MSHA is wrong because there is a clear increase in danger. It is axiomatic that the greater the exposure to the hazard, the more likely an accident. Respondent's uncontroverted evidence clearly establishes that the placement of berms can be hazardous (Tr. 143). Further, the type of berms MSHA requires here (some 58 miles) are transient. Their duration can be as short as three hours (Tr. 144). But a berm on a bona fide elevated roadway is not so transient (Tr. 83).

The Commission in El Paso Rock did not consider the factors respondent now raises. But to reiterate, I lack the authority to overturn the Commission's clear directive. Further, while respondent's videotape and supporting testimony were generally admissible it was basically a revisit to the diminution of safety, or as it is sometimes called, the greater hazard doctrine. Respondent argues that Penn Allegh, 3 FMSHRC 1392, 1399 is not controlling because the case dealt with explicit cabs and canopies regulations. But here, the parties are arguing over a relatively vague standard.

I disagree. Respondent's evidence seek to invoke the diminution of safety, or the greater hazard doctrine. In Penn Allegh the Commission refused to approve such an attempt to short circuit the Act. The Commission observed that when those situations exist where the application of the standard diminishes, rather than enhances, miners' safety the operator may petition the Secretary of Labor for relief from the application of the standard. The Act provides a set procedure for granting or denying the relief sought. Penn Allegh at 1397. There are detailed regulations governing the processing of such petitions, 30 C.F.R. Part 44.

In sum, respondent's evidence seeking to establish the diminution of safety, or greater hazard doctrine, is rejected.

Respondent asserts that even if a berm had been emplaced it would not have prevented Yazzie's accident. It is claimed that no one knows what caused Yazzie to veer off course and he would probably have trammed right through a berm in any event. Since a coal shot had heaved the area the previous berm (had there been one) would have been removed for the drilling and shooting sequence. Further, Yazzie would have been the first dozer operator in the area (Tr. 147).

It is certainly reasonable to infer that a proper berm would not have prevented Yazzie's accident. But a nexus is not required between an accident and the violation of a standard. The presence of a berm might well have served to warn Yazzie of the presence of the keyway.

Respondent's arguments that MSHA failed to offer as a witness the inspector who wrote the citation and further failed to offer the citation itself in evidence lack merit. Inspector Denning testified as to the issuance of the citation (Tr. 28). He further wrote Exhibit P1, an extensive report of this fatality. In Exhibit P1 MSHA entered its finding as follows: "A berm was not provided on the elevated outer back of the haulage road in pit 001-0 from ramp C for a distance of about 600 feet along the Blue seam coal bench, a violation of Section 77.1605(K), 30 CFR." Respondent's arguments seek to elevate form over substance.

Respondent's claim that MSHA's interpretation would shut down the surface coal mine operations in the United States is rejected.

Respondent has obviously not shut down its surface coal mine operation at the Black Mesa Mine in Navajo County, Arizona. Respondent's evidence and argument that the mines in the eastern part of the United States would be shut down must await the detailed evidence in such a case. In short, I decline to rule on a hypothetical situation.

For the above stated reasons, I conclude that Citation 2006837 should be affirmed.

Citation 2006838

In this citation the Secretary of Labor seeks a civil penalty of \$241 because respondent's employee Yazzie failed to wear a seat belt thereby violating the mandatory standard published at 30 C.F.R. § 77.1710(i) which provides:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

(i) Seat belts in a vehicle where there is a danger of overturning and where roll protection is provided.

Issue

The issue is whether respondent violated the seat belt regulation.

Summary of the Evidence

MSHA's evidence shows that Yazzie was not wearing a seat belt at the time of the accident (Tr. 28, Exhibit P1). MSHA, in its written report, concluded the failure to wear the seat belt in the vehicle was a contributing factor to Yazzie's death (Exhibit P1).

Respondent's mine superintendent indicated that the company requires that seat belts be worn. The workers are informed of this requirement through task training, annual retraining, individual contacts and general discussion (Tr. 153).

If an employee is caught not wearing a seat belt he is given a warning. If it occurs again he receives a written warning (Tr. 153).

Respondent's safety manager and pit boss confirmed the superintendent's testimony. Further, he indicated that the company reinstalls seat belts if they are damaged or removed (Tr. 117, 120, 121, 129, 147). Equipment operators have been disciplined for failing to wear seat belts (Tr. 130, 148, 149). The discipline graduates to suspension or discharge (Tr. 130).

Discussion

The Secretary, in his post trial brief, is aware of the Commission decision in Southwestern Illinois Coal Corporation, 5 FMSHRC 1672, (October 1983). But the Secretary claims the majority decision violates the long line of strict liability cases imposed by the Act. Further, the Secretary argues that the minority view is more persuasive. The Secretary's contentions are rejected. I am obliged to follow the majority view in Southwestern Illinois.

The Secretary further argues that the respondent has not satisfied the criteria in North American Coal Company, 3 IBMA 93, cited in Southwestern Illinois. The Secretary's argument is this: pit boss Contratto had never given a written seat belt warning to anyone and he was unable to present actual examples of a warning. I agree the evidence shows that Contratto himself had never gave an employee a written disciplinary notice for failing to wear a seat belt (Tr. 148, 149). But the Secretary misconstrues the evidence in the transcript at 149, 150. Contratto testified that there have been written disciplinary actions. But he hadn't brought notices to the hearing (Tr. 148-150). On this record Johnson and Cook establish that respondent was diligent in the enforcement of its seat belt regulation (Tr. 120, 121, 129, 130, 153, 154). Southwestern Illinois criticized the operator because the wearing of belts was delegated to the discretion of each employee. This is not the situation here. Witnesses Contratto, Johnson and Cook establish that the respondent was diligent in its enforcement of the seat belt regulation.

I further note that no facts indicated that the company knew Yazzie had his seat belt off at the time of the accident, if, in fact, it was off. (Tr. 29).

I reject the Secretary's arguments.

For the foregoing reasons Citation 2006838 and all penalties therefor should be vacated.

Civil Penalty

The Secretary seeks a civil penalty of \$2,000 for the berm violation.

Section 110(i) of the Act, codified at 30 U.S.C. 820(i), requires the Commission in penalty assessments to consider the size of the operator's business, its negligence, its ability to continue in business, the gravity of the violation, and the operator's good faith in seeking rapid compliance.

The parties stipulated that respondent, a large operator, has a moderate history. Further, the imposition of a civil penalty would not affect its ability to continue in business (Tr. 5). Respondent was negligent. The gravity is high when one considers the possibility of a 31 foot fall into a keyway. But on the other hand, I cannot hold the absence of berms necessarily contributed to Yazzie's accident and resulting death. To the operator's credit is its demonstrated good faith in rapidly abating the citation.

The Commission file does not contain the Secretary's special assessment narrative but on balance I conclude that a penalty of \$750 is appropriate.

The Solicitor and respondent's counsel have filed detailed briefs which have been most helpful in analyzing the record and defining the issues in the case. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

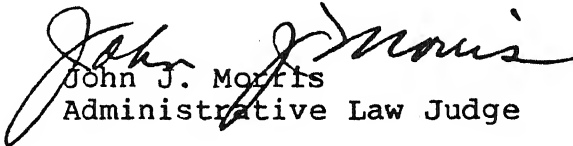
1. The Commission has jurisdiction to decide this case.
2. Respondent violated the mandatory standard published at 30 C.F.R. § 77.1605(k) and an appropriate penalty therefor is \$750.
3. Respondent did not violate the mandatory standard published at 30 C.F.R. § 77.1710(i), and all proposed penalties therefor should be vacated.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

1. Citation 2006837 is affirmed and a penalty of \$750 is assessed.

2. Citation 2006838 and all proposed penalty therefor are vacated.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
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MAR 6 1984

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-95-DM
ON BEHALF OF	:	
DOUGLAS A. BURKE,	:	MSHA Case No. MD 82-95
Complainant	:	
v.	:	Colony Oil Shale Project
	:	
BROWN & ROOT, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Carlson

The parties have submitted a stipulation and settlement agreement which, if approved, will resolve all issues in this discrimination case.

Under the terms of the agreement, respondent, Brown and Root, Inc. (Brown and Root), agrees to pay to Douglas A. Burke the sum of \$7,500.00 for loss of back wages and all other expenses resulting from his discharge. Brown and Root further agrees to expunge from complainant's employment record any adverse references relating to his discharge.

Complainant, in turn, relinquishes any claim to reinstatement to the job he held prior to his discharge.

The parties agree that approval of these terms will fully settle all issues raised in the case.

Having reviewed the file and considered all the circumstances, I conclude that the settlement should be approved.

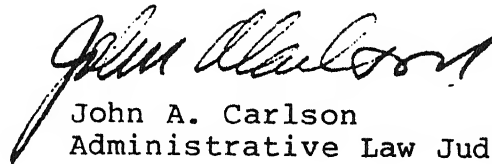
Accordingly, the agreement of the parties is approved in its entirety.

Brown and Root shall therefore tender to Douglas A. Burke through the United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294, the sum of \$7,500.00. The sum shall be paid within 30 days of this present

order. Brown and Root shall further, within that same time period, expunge from the employment record of Douglas A. Burke any adverse references to his discharge.

In view of this settlement, this discrimination proceeding is dismissed.

SO ORDERED.


John A. Carlson
Administrative Law Judge

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAR 7 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 80-354
Petitioner :
v. : No. 1-S Mine
MARTIN COUNTY COAL CORPORATION, :
Respondent :

ORDER OF DISMISSAL

Before: Judge Steffey

Counsel for the Secretary of Labor filed on September 12, 1980, in the above-entitled proceeding a petition for assessment of civil penalty seeking to have a penalty assessed for the violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 which I had found occurred in my decision issued in Martin County Coal Corporation v. Secretary of Labor (MSHA), et al., Docket Nos. KENT 80-212-R, et al., 2 FMSHRC 2829 (1980).

The Commission's decision in Council of Southern Mountains, Inc. v. Martin County Coal Corporation, Docket No. KENT 80-222-D, 6 FMSHRC, issued February 29, 1984, reversed my decision reported at 2 FMSHRC 2829 and held that no violation of section 105(c)(1) occurred when Martin County Coal Corporation refused to allow a non-employee miners' representative to come on mine property for the purpose of monitoring Martin County Coal Corporation's training classes.

Since no violation of section 105(c)(1) occurred, the civil penalty sought for that violation in the petition for assessment of civil penalty filed in this proceeding must be dismissed.

WHEREFORE, it is ordered:

The petition for assessment of civil penalty filed in Docket No. KENT 80-354 is dismissed and all further proceedings in this case are terminated.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

MAR 8 1984

LONNIE JONES, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 83-257-D
MINGO COAL COMPANY, INC., : BARB CD 83-19
Respondent :

DECISION

Appearances: Jeffrey A. Armstrong, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Barboursville, Kentucky, for Complainant;
David W. Burton, Esq., Leick, Hammons & Burton, Corbin, Kentucky, for Respondent Mingo Coal Company, Inc.;
Larry Conley, Esq., Williamsburg, Kentucky, for D & R Contractors.

Before: Judge Melick

This case is before me upon the complaint of Lonnie Jones under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act", alleging that he was discharged as an employee of Mingo Coal Company, Inc. (Mingo) on April 25, 1983, in violation of Section 105(c)(1) of the Act.¹ As subsequently amended, his complaint charges alternatively that if he was not an employee of Mingo then he was unlawfully discharged on that date from the partnership known as D & R Contractors. On August 18, 1983, Mingo filed a Motion to Dismiss and Motion for Summary Decision alleging inter alia that Jones had never been its employee and that it had nothing to do with his discharge or removal from D & R Contractors, an alleged independent contractor. For the reasons set forth below, the Motions are granted.

¹Section 105(c)(1) of the Act provides in part as follows: "No person shall discharge *** or cause to be discharged or otherwise interfere with the exercise of the statutory rights of any miner *** in any *** mine subject to this Act because such miner *** has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent *** of an alleged danger or health violation in a *** mine *** or because of the exercise by such miner *** on behalf of himself or others of any statutory right afforded by this Act."

As a preliminary matter, it is necessary to review the legal and factual basis for Mr. Jones' complaint herein. In order to establish a prima facie violation of Section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge or removal was motivated in any part by that protected activity. Secretary, ex rel David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds, sub nom, Consolidation Coal Company v. Secretary, 663 Fed. 2d 1211 (3d Cir. 1981). See also NLRB v. Transportation Management Corporation 76 L. Ed. 2d 667 (1983), affirming burden-of-proof allocations similar to those in the Pasula case.

In this case, Mr. Jones asserts that he was discharged on the afternoon of April 25, 1983, because he refused to work a double shift of sixteen hours. At hearing, Jones alleged that he arrived at the Mingo coal mine for work at about 7:15 on the morning of the 25th and worked until approximately 5:00 p.m. with only one-half hour break for lunch. He further alleged that he had a headache and the flu that day and was therefore not feeling well. He thus claims that when the "foreman", Ron Perkins, approached him that afternoon about working additional overtime, he declined, believing it would be hazardous. Jones claims that when he was discharged later that afternoon by Perkins, that action was based upon his refusal to work overtime, a work refusal protected by the Act. A miner's exercise of the right to refuse work is a protected activity under the Act so long as the miner entertains a good faith, reasonable belief that to work under the conditions presented would be hazardous. Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). See also Eldridge v. Sunfire Coal Company, 5 FMSHRC 408 (1983), pet. for review granted July 11, 1983.

As noted, Mingo argues in its motions that whether or not Ron Perkins violated Jones' rights under the Act is irrelevant because Perkins and Jones were not its employees or agents but were operating as partners in a completely separate business venture known as D & R Contractors, an independent contractor with which Mingo had contracted to produce coal from its mine.² Mingo further asserts that it had nothing to do with Jones' "discharge" from D & R Contractors.

It is not disputed that Mingo is a corporation under Kentucky law and is wholly owned by Roger Daniel. Daniel and his wife are the only officers of the corporation which owns the coal mine involved in this proceeding. It is further undisputed

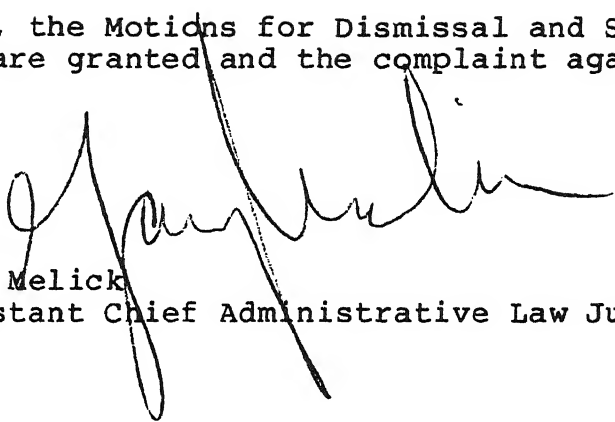
²D & R Contractors was later joined as a respondent in this proceeding and that case has been severed for separate proceedings under Docket No. KENT 83-257-D(A).

that Ron Perkins formed a "partnership" known as D & R Contractors which contracted with Mingo to produce coal from the Mingo mine and to put it "outside" at a specified price per ton. Daniel testified that he never hired, fired, or disciplined any persons affiliated with D & R Contractors and never directed any of its work. It is indeed clear that Daniel did not direct any of the underground mining operations but left that to Ron Perkins and D & R Contractors. There is, moreover, insufficient evidence in this case that Perkins was an employee or agent of Mingo.

Lonnie Jones admits that in connection with his work at the Mingo mine he signed a partnership agreement, was told that he "worked for" D & R Contractors, was paid by D & R Contractors, was directed in his work by one of the partners, Ron Perkins, and was "discharged" by Perkins. In addition, except for the first few paychecks, Jones was paid based on a share of the coal produced by the partnership and when he was "discharged" was paid based on a share of the coal then piled outside the mine. Jones also admitted at hearing that after he began receiving his pay on checks from D & R Contractors, he assumed he was working for D & R Contractors. While it appears from this evidence that under Kentucky law Jones may very well have been a partner of D & R Contractors, Jones maintains that if he was not an employee of Mingo Coal Company, he was an employee (and not a partner) of D & R Contractors. See Ky. Rev. Stat. § 362.180. For purposes of this decision, however, it is not necessary to determine whether Jones was an employee or partner of D & R Contractors. In any event, it is clear that Jones was not an employee of Mingo and therefore Jones could not have been discharged from Mingo.

It is nevertheless arguable that Mingo through one of its agents caused Jones' expulsion or discharge from D & R Contractors. While there is insufficient evidence in this case to indicate that Perkins was an employee or agent of Mingo, the argument is advanced that Roger Daniel, acting on behalf of Mingo, participated in Jones' discharge from D & R Contractors. In this regard, however, Jones admits that when he was "fired" by Perkins, Roger Daniel was merely standing nearby and said nothing. Jones also testified that when he later asked Daniel if he would help (presumably to intervene on his behalf), Daniel responded, "Don't look at me, I run the outside." Perkins and Daniel testified that Daniel was not present when Jones was discharged by Perkins, that Daniel had not previously been consulted about Jones' discharge, and that Daniel had no advance knowledge of the discharge. I cannot find from either version of events that Daniel had any part in the discharge of Jones. Accordingly, I do not find that Mingo was responsible in any way for Jones' discharge from the partnership, D & R Contractors. Since Mingo was not responsible for the discharge, it makes no difference for purposes of Mingo's liability under the Act whether that discharge was in violation

of the Act. Accordingly, the Motions for Dismissal and Summary Decision filed by Mingo are granted and the complaint against Mingo is dismissed.³



Gary Melick
Assistant Chief Administrative Law Judge

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Larry E. Conley, Esq., P.O. Box 577 102 South Third Street, Williamsburg, KY 40769 (Certified Mail)

/nw

³This is a final disposition of the proceedings captioned Lonnie Jones v. Mingo Coal Co., Inc., Docket No. KENT 83-257-D. Commission Rule 65, 29 C.F.R. § 2700.65. The case Lonnie Jones v. D & R Contractors has been severed for further proceedings and assigned Docket No. KENT 83-257-D(A).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 13 1984

ELIAS MOSES,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 79-366-D
v.	:	
	:	MSHA Case No. CD 79-217
WHITLEY DEVELOPMENT CORPO-	:	
RATION,	:	Becks Creek Surface Mine
Respondent	:	

DECISION ON REMANDED ISSUE OF BACK PAY

Appearances: William E. Hensley, Esq., and Don Moses, Esq., 1/ Corbin, Kentucky, for Complainant; David Patrick, Esq., Harrodsburg, Kentucky, for Respondent.

Before: Judge Steffey

PROCEDURAL BACKGROUND

The Commission issued a decision in this proceeding on August 31, 1982, affirming my finding that complainant had been discharged in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), and remanding the case to me " * * * for the limited purpose of allowing the parties to present arguments and additional evidence concerning the proper amount of back pay to be awarded the discriminatee" (4 FMSHRC at 1475).

After receiving the Commission's decision of August 31, 1982, I issued an order on September 7, 1982, asking counsel for the parties to advise me by September 24, 1982, as to the types of evidence and/or arguments they might wish to present on the issues of back pay and asking whether they wished me to convene a supplemental hearing to receive evidence on the back-pay issues. Thereafter, I issued an order on October 6, 1982, granting the parties' request for an extension of time within which to answer the questions asked in my order of September 7, 1982. The order of October 6 also answered respondent's questions regarding the kinds of evidence needed for resolving the back-pay issues.

1/ Although Mr. Moses entered an appearance at the first back-pay hearing, he has not been awarded any reimbursement for attorney's fees.

Subsequently I issued an order on November 2, 1982, granting respondent's request for the convening of a hearing on the issues of back pay. The hearing was scheduled for November 30, 1982, because respondent's counsel is the "Public Defender" in his community and November 30, 1982, was the first day of a 3-day period then open on his calendar of hearings.

The hearing was convened on November 30, 1982, as scheduled, but it became obvious during the cross-examination of respondent's owner that he did not have in the hearing room the detailed facts required to support his claim that complainant would have been laid off in 1980 for economic reasons if he had not been discharged on July 3, 1979 (BPTr. 31; 34-36). ^{2/} Because of other commitments (BPTr. 57; 58; 60), there was no day during the remainder of the week after the convening of the hearing on November 30, 1982, when counsel for the parties and respondent's owner could meet to make a detailed examination of respondent's payroll records for the purpose of determining when complainant would have been laid off for economic reasons if he had not been discharged on July 3, 1979. Therefore, it was agreed that I would personally examine respondent's payroll records on December 1, 1982, that I would thereafter issue a proposed decision on the issue of back pay, and that the parties would be allowed to comment on the proposed decision and be granted a supplemental hearing if either party still believed that one was necessary (BPTr. 63).

Before I could issue the proposed decision on the issue of back pay, however, respondent filed on December 23, 1982, a motion asking that the record be reopened for the purpose of permitting respondent's counsel to introduce newly discovered evidence which respondent's counsel claimed he could not have discovered prior to the time the original hearing was held on November 18, 1980. The Commission issued a supplemental order on January 14, 1983, authorizing me to decide the issues raised by the filing of respondent's motion for reopening the record to receive newly discovered evidence. On January 18, 1983, I issued an order requiring respondent's counsel to submit by February 7, 1983, additional justification in support of his motion for reopening of the record.

On January 20, 1983, I issued the proposed decision on the issue of back pay. The proposed decision provided for the parties to file responses to the proposed decision on back-pay issues by February 21, 1983, and stated that no final decision as to back pay would be issued until I had first resolved all issues pertaining to respondent's motion for reopening the hearing.

^{2/} The letters "BP" are used as an abbreviation for the words "back pay" and mean that I am referring to one or more pages from the transcript of the hearings held on the back-pay issues on November 30, 1982, and July 12, 1983, to distinguish such references from other references to the transcript of the original hearing which was held on November 18, 1980.

Neither party filed any objections to the proposed decision within the 30-day period. Therefore, on February 28, 1983, I wrote the parties a letter advising them that I had decided to deny the motion to reopen the record and that I would issue the proposed decision as to back pay in final form after respondent had been given an opportunity to review my back-pay calculations so that my decision could specify a verified amount of back pay to which complainant was entitled.

Instead of replying to my request for a verification of the calculation of back pay, respondent filed a motion requesting that I disqualify myself as the judge in this proceeding. The Commission issued an order on March 23, 1983, 5 FMSHRC 297, authorizing me to decide the issues raised in the motion for disqualification and I issued an order on April 1, 1983, denying the motion for disqualification. In that order, I also extended to April 18, 1983, the time for the parties to submit objections, if any, to the proposed back-pay decision issued January 20, 1983. Respondent duly filed on April 18, 1983, a memorandum on the issues of back pay. That memorandum stated that respondent wished to submit additional evidence with respect to the back-pay issues.

On May 19, 1983, I issued two orders. The first order denied respondent's motion to reopen the record to receive newly discovered evidence and the second order granted respondent's request for the convening of a supplemental hearing on the back-pay issues. Because of respondent's role as public defender and the possibility of conflicting prior commitments, I provided for the parties to notify me of a date which would be mutually convenient for holding the second hearing pertaining to back pay. After receiving replies to that request, I issued on June 6, 1983, a notice providing for the second back-pay hearing to be held on July 12, 1983.

The issues considered at the hearing held on July 12, 1983, were broadened beyond the scope of the first back-pay hearing by the fact that respondent's counsel raised for the first time in this proceeding the issues of the amount which I had awarded for attorneys' fees in my original decision issued March 31, 1981, 3 FMSHRC 746. An additional issue was raised with respect to whether respondent properly refused to reinstate complainant to his original position as a dozer operator when he reported for work about 11 a.m. on February 8, 1983, instead of the designated day of February 7, 1983, because complainant's counsel failed to notify him of the offer of reinstatement until February 8, 1983.

After returning from the second back-pay hearing held on July 12, 1983, I realized that if I ruled that respondent had improperly refused to reinstate respondent because he was a day

late in reporting for work, I would have to order respondent to pay wages for a period in 1983 which had not been considered when data were originally obtained for purposes of calculating back pay. Therefore, I issued an order on August 18, 1983, providing for the parties to submit additional statements or arguments with respect to three questions posed in that order. Subsequently, I issued an order on September 15, 1983, granting respondent's motion for an extension of time to October 5, 1983, within which to reply to the order of August 18, 1983. Thereafter, I issued on September 27, 1983, an order granting complainant's alternative request for an extension of time within which to file a reply brief. Finally, on November 8, 1983, I issued an order requiring the parties to submit by December 2, 1983, (1) evidence with respect to the number of hours to be used in calculating back pay for the period in 1983 during which complainant was not employed because of his having reported a day late for reinstatement and (2) information pertaining to any wages which complainant may have earned during the applicable period in 1983.

Complainant's reply to the order of November 8, 1983, was mailed on December 7, 1983, which was 5 days after the date provided for the mailing of replies in my order of November 8. Therefore, on December 14, 1983, respondent's counsel filed a motion asking that I dismiss complainant's claim for compensation for the period in 1983 during which complainant was not reinstated. Complainant's counsel has filed no reply to respondent's motion. I shall hereinafter rule upon respondent's motion of December 14, 1983, as a part of this decision.

I shall not hereinafter again refer to respondent's motion for disqualification or motion for reopening the record because, as indicated above, I have disposed of all issues raised in those motions in my separate orders issued April 1, 1983, and May 19, 1983. I have acted upon the motions in separate orders apart from this decision because each of those matters has already been the subject of separate Commission orders and the record should clearly reflect the disposition which I have made as to each of those motions.

DETERMINATION OF FIRST PERIOD FOR REIMBURSEMENT OF BACK PAY

At the first back-pay hearing held on November 30, 1982, complainant testified that the only wages he had earned between the time of his discharge by respondent and the day of the hearing was an amount totaling \$20,612.47 which had been paid to him by Four J Coal Company and B. C. McCullah Bros., Inc., for work performed from June 15, 1981, through May 25, 1982 (BPtr. 21). Although two different employers appear to have employed complainant, the two names just indicate a change in a single employer's name (Exh. 2). Complainant stated that although he had tried to obtain work with other companies, he had been

unsuccessful in doing so and that the only other money he had received between the time of his discharge on July 3, 1979, and the date of the hearing held on November 30, 1982, had been in the form of unemployment compensation. Complainant was aware that, if he ultimately receives back pay from respondent, he will have to reimburse the agency which paid him unemployment compensation (BPtr. 22).

Respondent's president, Pascual White, testified that his sales contract with Atlantic City Electric Company had been cancelled and that he had been unable to find any alternative market for the coal he was producing (BPtr. 23-24). White said that he had been reducing his coal-producing activities ever since 1980 and that if complainant had not been fired (BPtr. 51) on July 3, 1979, he would have been laid off on March 8, 1980, as a part of the general reduction in his work force (BPtr. 28; 33). White said that, for all practical purposes, he had completely closed down his coal-producing business in 1982 and had laid off about 49 miners in the process (BPtr. 49). White gave some dates on which he had laid off several miners. The first of those dates was March 8, 1980. Other dates were June 14, 1980, November 22, 1980, February 28, 1981, and June 20, 1981 (BPtr. 32; 34-36). He said that the largest single reduction in the work force occurred in mid April 1982 when his entire production of coal from surface mines was discontinued (BPtr. 37).

During White's cross-examination, it became very obvious that he did not have the detailed facts required to support a finding that complainant would have been laid off in 1980 if he had not been fired on July 3, 1979 (BPtr. 31; 34-36). Since White did not bring to the hearing any of his payroll records to support his allegations, counsel for the parties debated for several pages what could be done to determine just when complainant would have been laid off for economic reasons if he had not been discharged on July 3, 1979 (BPtr. 45-52). At that point in the discussion, I suggested that it might be best for me to go through the payroll records and report my findings to the parties, but it turned out that counsel for complainant could not attend a further discussion of the facts on Wednesday, December 1 (BPtr. 57), that White could not be present for a discussion on Thursday, December 2 (BPtr. 60), and that counsel for respondent could not attend a meeting on Friday, December 3 (BPtr. 57-58). The only alternative offered to my suggestion that I examine all of respondent's payroll records was offered by counsel for respondent, but that consisted of Xeroxing all of the records and sending them to me at my office in Falls Church, Virginia (BPtr. 59), but that would still have involved my doing all of the parties' work for them and would have deprived me of the assistance of White's bookkeeper in case I needed to ask any questions about the way the payroll records were maintained (Tr. 60).

Because some of the parties, or their counsel, were not free to meet on any day during the remainder of the week, it was agreed that I would issue a proposed decision after I had gone to respondent's office in Williamsburg, Kentucky, and had reviewed respondent's payroll records. It was further agreed that the parties would be permitted to file objections to the proposed decision and would be provided with a further hearing if they believed one was necessary (BPTTr. 63).

In keeping with my agreement to examine the payroll records, I drove to respondent's office in Williamsburg on December 1, 1982, and spent the entire day in making notes pertaining to respondent's employees who were either hired or laid off or voluntarily quit during 1979, 1980, 1981, and up to December 1, 1982. Thereafter I prepared the appendices attached to this decision and those appendices contain all of the information I obtained as a result of examining respondent's payroll records.

As I have indicated in the procedural background given above, the proposed decision was issued on January 20, 1983, and respondent's counsel filed objections to the proposed decision on April 18, 1983. I shall hereinafter explain what respondent's objections were and indicate the lack of merit to them, but a discussion of his objections to the proposed decision will be facilitated if I first proceed with the rationale originally used in my proposed decision for determining that complainant would have been laid off for economic reasons on June 12, 1982, if he had not been previously discharged on July 3, 1979.

White testified that when a general reduction in force was required because of the loss of coal orders and the reduction of coal production, it was his policy to lay off first the employees who had been hired last (BPTTr. 25). In other words, he followed the normal rule of laying off employees in accordance with their seniority. White's bookkeeper provided me with the two sheets which comprise Appendix G. I have added to those two sheets the actual dates on which those employees were laid off. While a few of the lay-off dates do not correspond exactly with seniority, or date of hiring, it is obvious that White did adhere somewhat closely to the principle that a person with considerable seniority would be discharged after a person with little seniority.

Since White himself said that it was his intention to follow the general rule of laying off in accordance with the employees' seniority, I have applied that rule in trying to determine when complainant would have been laid off if he had not been dropped from the payroll at the end of June 1979. The discussion of the data which follows requires me to conclude that complainant would have been laid off on June 12, 1982, if he had not been dropped from the payroll at the end of June 1979.

Exhibit H in this proceeding is a copy of one of the sheets in respondent's payroll records. Exhibit H pertains to complainant, but it shows the characteristics which are common for all of respondent's payroll records. The caption at the top of the first column in Exhibit H reads "Week Ending". The hours worked on each of the 7 days of a given week are shown to the right of the column headed "Week Ending". The dates used in all of the attached appendices, except in Appendix G, are the dates shown in the column headed "Week Ending". The first two columns of Appendix G were prepared by respondent's bookkeeper and Appendix G shows in the second column the exact date in a given week when a person was hired. If one will examine the first name, "Boyd Keith", in Appendix G with Boyd Keith's name in Appendix A, he will find that I show Boyd Keith in Appendix A as having been hired on 8/29/81, whereas respondent's bookkeeper shows in Appendix G that Boyd Keith was hired on 8/24/81. In other words, the facts given in my appendices are based on end-of-the-week dates, instead of exact dates. For purposes of determining the time when complainant would have been laid off for economic reasons, had he continued to work for respondent, there is no need to make a finding which is so precise that it would make any difference whether an employee was hired on a Monday or a Friday or was discharged on a Wednesday instead of a Friday. Of course, that would not be true for computing back pay because a difference or mistake of even 1 day would cost respondent approximately \$60. Since Exhibit H is a copy of the payroll record used to pay complainant, there is no lack of precise data for determining the amount of back pay which is due to complainant.

Of the six persons, other than complainant, who either quit or were laid off in 1979, no two persons were laid off on the same day and only two persons were laid off in the same month, so there is no pattern to show that a general lay off occurred at all in 1979. Seven employees, excluding complainant, were hired on or after May 12, 1979, the date on which Moses was hired. Therefore, the work force remained very stable in 1979.

Of the 17 persons who either quit or were laid off in 1980, 3 left in January, 3 left in February, one left in March, 3 left in April, none left in May, 2 left in June, none left in July, 1 left in August, 1 left in September, none left in October, 2 left in November, and 1 left in December. Those figures show that there was no general lay off at any time in 1980. Moreover, since respondent hired 28 employees in 1980 and lost only 17 employees, the work force increased by 11 persons during 1980. Consequently, there is no evidence to show that Moses would have been laid off in 1980 because of an overall down turn in respondent's business.

Of the 41 employees who either quit or were laid off in 1981, 1 left in January, 2 left in February, 5 left in March, 4 left in April, 4 left in May, 10 left in June, 2 left in July, 3 left in August, 1 left in September, 3 left in October, 2 left in November, and 4 left in December. The reduction of 41 persons in respondent's work force supports a finding that something unusual occurred to cause such a large reduction in the work force within a period of 1 year. It is difficult, however, to make a finding that an extreme decline in respondent's production was occurring because the loss of 41 employees was offset by the fact that respondent hired 35 new employees in 1981. Consequently, the work force was less by only 6 employees at the end of 1981 than it was at the beginning of 1981. Therefore, the facts do not support a finding that Elias Moses would have been laid off in 1981 if he had not been discharged in 1979.

The facts for 1982, however, support a finding that respondent's business was suffering a steady decline. Of the 41 employees who either quit or were laid off in 1982, 1 left in January, 3 left in February, 3 left in March, 22 left in April, 1 left in May, 9 left in June, 1 left in July, none left in August or September, 1 left in October, and none left in November. Since the data here being analyzed were collected on December 1, 1982, no conclusion can be made as to December, except that it is a fact that on December 1, 1982, respondent's employees had shrunk to 8 if one excludes members of respondent's own family, a secretary, an airplane pilot, and an engineer who have been deliberately omitted from my consideration of the question of when Elias Moses would have been laid off if he had not been discharged in 1979. As opposed to the loss in respondent's work force of 41 employees in 1982, only 12 new employees were hired. While the 12 new employees were all laid off in 1982, they have to be deducted from respondent's work force in order to arrive at a correct conclusion as to the net reduction of the work force in 1982. When the aforesaid calculation is made, the net loss to respondent's work force in 1982 was 29 employees ($41 - 12 = 29$).

Elias Moses was employed as an operator of a D-9 Caterpillar tractor which he operated most of the time, although he did act as a mechanic's helper, hauled powder, and worked in the repair shop on some days when dozers were not available (Tr. 5-6; 32; 41; 63; 252). Respondent supplied me with a list of 11 employees (Appendix G) who could operate dozers. All but two of those employees were hired after Moses and not one of them was discharged prior to April 1982 when five of them were laid off. Four more dozer operators were laid off on June 12, 1982, and only one of them is still employed and he was hired in 1974, or about 5 years before Elias Moses was hired. The aforesaid figures support a conclusion that Elias

Moses would have been discharged on June 12, 1982, along with the four other dozer operators who were laid off on that day, if he had not already been discharged at the end of June 1979.

The discussion above is easily understood if the facts are set forth in the tabulation hereinafter shown. Payroll data become important in the year 1979 because determining seniority for purposes of laying off employees must be based on those employees who were hired before and after May 12, 1979, the day on which Elias Moses was hired.

1979

- 38 Number of persons, excluding complainant, on payroll or hired in 1979 (Appendix B)
- 6 Number of persons, excluding complainant, who left work force in 1979 (Appendix I, page 1)
- 32 Number of persons actively employed at end of 1979

1980

- 28 Number of new persons hired in 1980 (Appendix C)
- 17 Number of persons who left in 1980 (Appendix I, page 1)
- 11 Net gain in personnel during 1980
- 32 Number of persons on payroll at end of 1979
- +11 Gain in employees during 1980
- 43 Number of persons actively employed or on payroll at end of 1980

1981

- 41 Number of persons who left respondent's employment in 1981 (Appendix I, page 1)
- 35 Number of new employees hired during 1981 (Appendix D)
- 6 Net loss in personnel during 1981
- 43 Number of persons on payroll at end of 1980
- 6 Loss in employees during 1981
- 37 Number of persons actively employed or on payroll at end of 1981

1982

- 41 Number of persons who left respondent's employment in 1982 (Appendix I, pages 1 and 2)
- 12 Number of new employees hired during 1982 (Appendix E)
- 29 Net loss in personnel during 1982

37 Number of persons on payroll at end of 1981
 -29 Loss in employees during 1982
8 Number of persons actively employed or on payroll
 as of December 1, 1982 (Appendix F)

The eight persons who were still employed or were on the payroll as of December 1, 1982, are set forth below as reflected in Appendix F:

<u>Employee</u>	<u>Date Hired</u>	<u>Type of Work or Status</u>
1. McClure, Richard	Before 5/12/79	Foreman and loader operator
2. Meadors, Homer S.	Before 5/12/79	Has been ill for months
3. Moses, Arvil, Jr.	Before 5/12/79	Truck driver and laborer
4. Moses, Issac	Before 5/12/79	Various jobs and dozer operator
5. Perry, Leonidas Xerxes	Before 5/12/79	Shop mechanic
6. Trammel, Arnold	Before 5/12/79	Truck driver and laborer
7. Moses, Dwight Wayne	8/29/81	Tipple laborer and drill operator
8. Daugherty, David John	9/12/81	Shop mechanic

The tabulation above showing the eight employees who were still on respondent's payroll as of December 1, 1982, indicates that two employees, Dwight Moses and David Daugherty, who were employed after complainant, are still working. It could be argued, therefore, that if complainant had not been unlawfully discharged in 1979, he would still be employed in one of the positions now held by Dwight Moses or David Daugherty. I do not believe that such an argument is valid because there is nothing in the record to show that complainant has any experience to qualify him for the position of either a tipple laborer or a drill operator, although he does apparently have some experience as a person who has filled explosive holes with powder and other materials after the holes have been drilled. Also, while the record does show that complainant has worked as a mechanic's helper and a "powder man" (Tr. 41; 234), there is nothing in the record to show that he could qualify as a shop mechanic. Consequently, I believe that my finding above to the effect that complainant would have been laid off on June 12, 1982, when all but one of the other dozer operators were laid off, is correct and is supported by the preponderance of the evidence. Additionally, it should be noted that complainant was hired by White as a "dozer man" (Tr. 251) and it would be improper to hold that complainant should continue to be paid for working as a "dozer man" after all other dozer operators hired on or after the date of complainant's hiring have been laid off.

Respondent's counsel objected before the Commission to my ordering complainant to be paid on the basis of a 40-hour week because the payroll records (Exhibit H) show that he only worked 40 or more hours for 3 of the 7 full weeks he was employed prior to his discharge. Respondent failed to introduce any evidence at the hearing held on November 30, 1982, to show that my use of a 40-hour week is wrong. On the other hand, if one adds the number of hours complainant worked during those 7 weeks, the total is 260 hours. If 260 hours are divided by 7, the average number of hours worked per week is 37.143 hours.

The testimony received at the original hearing held on November 18, 1980, shows that respondent was unable to work an average of 40 hours each week because one or more dozers were out of order. Also, it is a fact that complainant was offered alternative work on the day of his discharge, but he refused to perform the alternative work because he felt that it was assigned to him by the foreman in a degrading manner (Tr. 73; 234). In the absence of any evidence to show that complainant would have worked more than an average of 37.143 hours per week if he had remained in respondent's work force up to June 12, 1982, I shall base the calculation of back pay on a working week of 37.143 hours. When it comes to the question of paying complainant for holidays, complainant should be paid the same amount as other employees having equivalent seniority, as described by White at BP transcript pages 39 through 41 and 88 through 93.

Consideration of Respondent's Objections to Proposed Decision

Alleged Failure To Allow for Loss of Work as Result of Inclement Weather and Repair of Caterpillar Tractors

In my original decision issued March 31, 1981, 3 FMSHRC 746, I noted, at 3 FMSHRC 761 and 762, that complainant had worked more than 40 hours some weeks and less than 40 hours on other weeks, and concluded that a 40-hour week would be a reasonable accommodation to allow for the vagaries of operating surface mines, but respondent argued before the Commission that he wanted to present additional evidence as to the issue of back pay. Although respondent failed to present any evidence at the first back-pay hearing with respect to the number of hours per week complainant would have worked if he had continued to be employed after his discharge on July 3, 1979, I reexamined the 7 weeks during which complainant worked for respondent and found that the total number of hours worked for respondent were 260. Dividing that total by 7 resulted in an average working week of 37.143 hours. That figure of 37.143 hours appeared on page 7 of my proposed decision issued January 20, 1983, and that was the figure which I used in the calculation of back pay which

I mailed to respondent on February 28, 1983, and requested respondent to check the accuracy of the calculations and let me know by March 15, 1983, whether any errors in the calculations had been found. Respondent never did reply to my request that the back-pay calculations be checked and the comments by respondent's counsel at the hearing (BPTr. 85-88) show that he had never examined the calculation of back pay which I had mailed to him on February 28, 1983, because he incorrectly claimed that my back-pay calculations assumed that respondent had worked 5 days each week for 52 weeks of the year (BPTr. 83). Respondent further contended erroneously that my back-pay calculations had failed to take into consideration the time lost because of bad weather and down-machine time (BPTr. 84). Respondent's counsel then stated that an examination of respondent's payroll records indicated that respondent's employees would lose 6 weeks of work each year because of bad weather and time required to repair equipment (BPTr. 84). Complainant's counsel agreed that respondent's estimate of 6 weeks lost because of bad weather and repair of equipment was a fair estimate (BPTr. 84).

Thereafter, I asked that respondent's counsel look at the back-pay calculation which I had mailed to him on February 28, 1983, and he recognized that I had used an average hourly working week of 37.143 hours and both respondent's and complainant's counsel agreed that my use of a figure of 37.143 hours was acceptable to them (BPTr. 100). Respondent's owner had testified at the original hearing that they worked 10 hours a day for 5 days each week (Tr. 248). If that were true, the working week would amount to 50 hours ($10 \times 5 = 50$) per week, or 2,600 hours per year ($50 \times 52 = 2,600$). Loss of 6 weeks of work as a result of bad weather and equipment repair would be 300 hours ($6 \times 50 = 300$). Deduction of 6 weeks or 300 hours would result in a working year of 2,300 hours which, when divided by 52, would result in an average working week of 44.2 hours.

Exhibit H, however, shows that complainant never worked more than 9 hours on any single day for the 7 full weeks he was employed by respondent. Application of the above assumptions to a working week of 45 hours ($9 \times 5 = 45$) and deduction of 6 weeks results in an average working week of 39.8 hours, instead of the average working week of 37.143 hours used by me for calculating back pay in the letter mailed to the parties on February 28, 1983. Therefore the use of a 40-hour week in my original decision (3 FMSHRC at 762) for purposes of calculating back pay was nearer to respondent's claimed loss of 6 weeks of work each year as a result of bad weather and equipment repair than the 37.143-hour week which I obtained by dividing complainant's total hours worked by 7. Nevertheless, since both parties have agreed that an average working week of 37.143 hours is acceptable, I shall hereinafter use an average working week of

37.143 hours in calculating back pay for the period from the time of complainant's discharge to June 12, 1982, the day he would have been laid off for economic reasons if he had not been discharged on July 3, 1979.

Holiday Pay

In my calculations of back pay mailed to the parties on February 28, 1983, I excluded pay for all holidays because I did not have precise data for use in determining which holidays, if any, respondent's miners failed to work. At the second back-pay hearing, respondent's owner, White, testified that the miners are off for the entire week during which Christmas occurs. The miners are given a bonus for the Christmas week based on their seniority. If a miner has worked for less than a year for respondent, he is given \$50 and a ham; if he has worked for 1 year, he is given a bonus of \$100; if he has worked for respondent for more than a year, he receives a full week's pay (BPtr. 92). White valued a ham at \$32 (BPtr. 93).

Since complainant would have been working for respondent for less than a year by the time Christmas occurred in 1979, complainant will be paid \$50 plus a ham or \$82 for the Christmas week of 1979. Since complainant would have been working for respondent for over 1-1/2 years by Christmas of 1980, complainant will be paid a full week's salary for the Christmas week of 1980. Complainant was working for another company during the Christmas week of 1981. Since complainant would have been laid off for economic reasons by June 12, 1982, no amount is required to be paid for the Christmas week of 1982. No back pay will be awarded for other holidays on which White said he did not work (BPtr. 39; 88-91; 99).

Seniority Modified by Versatility

White had testified at the first back-pay hearing held on November 30, 1982, that he had chosen the miners to be laid off for economic reasons on the basis of seniority (BPtr. 25). At the second hearing, respondent's counsel argued that the work force was steadily declining for economic reasons in 1982 and that he believed complainant would have been laid off no later than March 1982 because only the employees with more seniority than complainant were kept to June 12, 1982, which was the economic discharge date determined by me in my proposed decision of January 20, 1983 (BPtr. 106). That claim cannot be sustained because Appendices G, I, and J show that the three miners (Rick Ball, Dellmar Sergeant, and Richard Towe) who were laid off in March 1982 were hired in 1981 and 1982, except for Dellmar Sergeant who was hired before complainant, but neither Sergeant nor the other two miners laid off in March 1982 were dozer operators (BPtr. 108-109). Respondent, therefore, has

shown no reason why complainant, a dozer operator, would have been laid off in March 1982 instead of one of the three non-dozer operators who were actually laid off in March 1982.

Respondent's counsel also argued that complainant would have been discharged in April 1982, when 22 employees were laid off, rather than in June 1982, when the last group of dozer operators were laid off, because some of the operators who were discharged on June 12, 1982, had greater versatility to perform a variety of tasks than complainant has and that respondent kept them on the payroll longer than respondent would have kept complainant because they had a greater value to respondent than complainant had (BPtr. 107; 120-121). Respondent's owner, White, was unable, however, to give any facts to support his counsel's argument. When White was asked why he had waited until June 12, 1982, to lay off the dozer operators listed on Appendices G and I, page 2, he gave no reason other than seniority for retaining Anderson and Baird until June 12, 1982, even though they were hired after complainant. White also claimed that Daugherty, another employee hired after complainant, is still working as chief mechanic for the entire company and that Daugherty is qualified to do things which complainant could not even attempt to do (BPtr. 115). The argument pertaining to Daugherty is incorrect because the dozer operator laid off on June 12, 1982, is named Jimmy Lee Daugherty, whereas the chief mechanic is named David John Daugherty (Appendix A, Item 22).

White was then asked to explain why Homer Walker was laid off in April even though he had more seniority than Otis Anderson who was laid off in June. White explained that Walker was laid off before Anderson because Walker had a dozer of his own and wanted to get some contract work doing custom jobs like constructing farm ponds and that Walker asked to be laid off (BPtr. 118). White was also asked why Chester Tackett, who had more seniority than Anderson, was laid off in April before Anderson. White explained that Tackett was laid off before Anderson because Tackett had been a reclamation dozer man for Long Pit Coal Company in Tennessee and that they recalled him to complete some reclamation work which had not been finished (BPtr. 119). It is obvious from White's testimony that neither Walker nor Tackett were laid off because of a lack of versatility.

The final argument given by respondent in support of its contention that complainant would have been laid off before June 12, 1982, when the final group of dozer operators were laid off, was that complainant, during the 7 weeks when he did work for respondent, had declined to fill explosives holes on the day of his discharge and had refused to operate a back dump on a previous occasion (BPtr. 120). Respondent's argument that complainant would have been laid off prior to June 1982 because of his refusal to perform work other than that of a dozer operator is not supported by the preponderance of the evidence.

Complainant testified that he worked as a mechanic's helper the first day of his employment by respondent (Tr. 5), that he worked as a mechanic on other occasions, that he worked in respondent's shop and hauled powder (Tr. 32), that he helped install a track on a D-6 dozer, changed oil, and did other work on dozers, such as replacing a muffler (Tr. 42; 63-64). White himself testified that he assigned complainant various kinds of work other than operating a dozer, including just cleaning up in the shop, and that he always paid complainant the wages of a dozer operator even when he was only doing the work of an ordinary laborer (Tr. 252; 279).

Complainant agreed that he did refuse to operate a back dump on one occasion because the work to be performed was very close to a steep bank and complainant did not believe that he had the expertise required for operating the back dump in that situation (Tr. 79). Complainant said that no argument developed when he declined to operate the back dump (Tr. 71). Complainant also declined to fill explosives holes on July 3, 1979, the day of his discharge, because the foreman offered the job in what complainant believed to be a degrading manner (Tr. 72-73). Although White claimed that none of the dozer operators laid off on June 12, 1982, had ever refused to perform any kind of work they were asked to do (BPTr. 115; 120), he did not give any examples of the kinds of work which any of them were qualified to do in addition to operating dozers; therefore, the record contains no facts which would support a finding that the dozer operators laid off on June 12, 1982, had any more ability to perform a variety of tasks than complainant possessed.

I pointed out at the hearing that I was not certain that it was even appropriate to consider versatility in addition to seniority in trying to determine the date on which complainant would have been discharged for economic reasons if he had not been unlawfully discharged on July 3, 1979, and respondent's counsel was given a period of 30 days within which to file a brief in support of his argument that I should take into consideration complainant's alleged lack of versatility in making a determination as to the date when he would have been laid off for economic reasons (BPTr. 126). At the end of the 30-day period, respondent's counsel filed on August 15, 1983, a letter in which he stated that he had been unable to find any cases directly in point on the issue of whether versatility should be given any weight over seniority in making a determination as to when employees should be laid off when a company is reducing its work force. I have not been able to find any cases which discuss that point either. Even if I had found some cases which show that versatility should be considered in addition to seniority, I still believe that it would be improper to give weight to versatility in the absence of any evidence to support such a contention. As I have demonstrated above, there is no evidence in this record to show that complainant would have

been laid off any earlier than June 12, 1982, if he had not been discharged on July 3, 1979.

ATTORNEY'S FEES

In my original decision issued on March 31, 1981, I ordered respondent to pay complainant's counsel an amount of \$2,500. Respondent did not object to my award of attorney's fees in its arguments before the Commission, but did raise the issue of attorney's fees when it filed its answer to my proposed decision issued January 20, 1983. The primary ground used by respondent in support of its objection to my awarding attorney's fees in the amount of \$2,500 was that complainant's counsel did not send respondent's counsel a copy of the letter in which he asked for payment of 30 hours of work at a rate of \$100 per hour. My decision reduced the number of hours to 25 because of the failure by complainant's counsel to provide a breakdown of the time spent in conferences as compared with representing complainant at the hearing (3 FMSHRC at 762).

Complainant was represented by two attorneys at the first back-pay hearing held on November 30, 1982. In a letter to the parties dated February 28, 1983, I ruled that nothing had occurred at the hearing held on November 30, 1982, which warranted complainant's being represented by two attorneys and that I would not entertain a bill for attorney's fees which reflected more hours for attending that hearing than the time which would have been expended by one attorney.

At the second back-pay hearing held on July 12, 1983, complainant's counsel stated that he would forego any additional compensation for work done in connection with the back-pay issues if respondent's counsel would agree to the prior award of \$2,500 which I had provided for in my original decision. Respondent's counsel agreed to accept the offer of settlement of the issue of attorney's fees (BPTr. 103-104). The settlement of the issue of attorney's fees was thereafter mentioned (BPTr. 128) in connection with the possibility of complainant's counsel having to write a brief in reply to any brief which respondent's counsel might submit with respect to use of versatility in determining the date of complainant's being laid off for economic reasons. It was agreed at that time that complainant's counsel would submit an additional claim for attorney's fees if he believed that an additional amount should be awarded (BPTr. 128). Inasmuch as no additional request for attorney's fees has been submitted by complainant's counsel, no additional amount for attorney's fees needs to be awarded as a part of this back-pay decision.

DETERMINATION OF SECOND PERIOD FOR REIMBURSEMENT OF BACK PAY

Stipulation of Facts Regarding Complainant's Failure to be Reinstated

Respondent's counsel wrote a letter dated February 2, 1983, to complainant's counsel advising him "* * * we are now offering Mr. Moses a position with Whitley Development Corporation and he is to report to work on Monday, February 7, 1983, at the hour of 8:30 a.m., at the main office of the corporation." The letter was sent by certified mail and post office personnel placed a notice in the post office box of complainant's counsel on Friday, February 4, 1983, to the effect that a certified letter had been received by the post office. Complainant's counsel did not go to the post office until Monday, February 7, 1983, at which time he signed the return receipt showing that complainant's counsel actually received on February 7 the letter offering complainant a job at 8:30 a.m. on February 7, 1983 (BPtr. 69-74).

Complainant's counsel called another attorney who lives closer to complainant than the attorney who represents complainant in this proceeding. That attorney did not advise complainant that he had been offered a job until the following day, February 8, 1983. Complainant's counsel also called respondent's counsel to advise him that the letter of February 2, 1983, had not been received until February 7, 1983, but respondent's counsel was unavailable. Although respondent's attorney attempted to return the call from complainant's counsel on the next day, February 8, 1983, complainant's counsel did not know that respondent's counsel had called because he received no message to the effect that his call had been returned. Respondent's counsel submitted a telephone bill to prove that he had tried to return the call from complainant's counsel on February 8, 1983 (BPtr. 74-80).

As previously indicated above, complainant was advised on February 8, 1983, that he had been offered a position by respondent and complainant did report for work about 11:30 a.m. on February 8, 1983, but respondent's owner, White, advised complainant that his failure to report on the day the position was offered, that is, February 7, 1983, had caused respondent to call another dozer operator to work in complainant's place and, for that reason, respondent did not any longer have a position to offer complainant.

White's testimony shows that complainant had been recalled to the position of a dozer operator primarily to perform some reclamation work which was completed on March 31, 1983 (BPtr. 131). Therefore, if complainant had been given a job on February 7, 1983, it would have lasted only for the period from February 7 through March 31, 1983.

Consideration of Parties' Arguments as to Reinstatement

An order was issued on August 18, 1983, providing the parties with an opportunity to file briefs on the following three issues:

(1) Was complainant properly denied reinstatement for appearing 1-1/2 days after the designated time of reinstatement, taking into consideration that he appeared for reinstatement as soon as he learned of the offer of reinstatement?

(2) If it is held that complainant is still entitled to be reinstated to his job as a dozer operator, should he receive back pay for the period from February 8 through March 31, 1983, which is the period of time worked by the dozer operators recalled at the same time complainant was recalled?

(3) Assuming that complainant is entitled to back pay for the [37-1/2]-day period involved, is there any reason why the calculation should not be made on the basis of the 37.143-hour work week previously established for computing back pay?

The Issue of Reinstatement

Respondent argues that complainant was properly denied reinstatement for his failure to report at the time designated in the letter of February 2, 1983, which had been sent to complainant's counsel in plenty of time for complainant to have been on notice that the job offer required complainant to report for work at 8:30 a.m. on February 7, 1983. Respondent states that complainant's contention that he could not be reached on February 7, when the offer of reinstatement was required to be fulfilled, because of the need for complainant's counsel to provide notice through another attorney in the State of Tennessee, is not a valid argument because it would have been unethical for respondent or respondent's counsel to have contacted complainant directly, rather than through the attorney who is representing complainant in this proceeding.

Respondent's brief also contends that his business was in need of immediate income and that he could not be expected to delay the work which he expected to do on February 7, 1983, because respondent needed the immediate income to be derived from that work. Respondent claims that it would have been a simple matter for complainant's counsel to have telephonically advised respondent's counsel, or respondent directly, that he had not been able to reach his client so that respondent could have held the position open for an additional period of time.

Complainant's brief argues that respondent failed to provide complainant with sufficient time prior to the date given for reporting for work. Complainant contends that respondent should have mailed a copy of the letter offering reinstatement to complainant as well as to his attorney of record in this proceeding. It is argued that such dual notification would have allowed for any possible failure of communication between complainant and his counsel and would have enabled complainant to report for work at the designated time.

Section 2700.7(d) of the Commission's rules of procedure, 29 C.F.R. § 2700.7(d), provides as follows:

(d) Service upon representative only. Whenever a party is represented by an attorney or other authorized representative who has signed any document filed on behalf of such party, or otherwise entered an appearance on behalf of such party, service thereafter shall be made upon the attorney or other authorized representative.

Since complainant has an attorney who has entered an appearance on his behalf and who has signed numerous documents on his behalf in this proceeding, there can be no doubt but that respondent's counsel fulfilled his legal obligation as to providing complainant with notice of the offer of reinstatement when he mailed the letter offering reinstatement to complainant's counsel.

It is interesting to note, however, that each attorney's brief condemns the other attorney for failure to get in touch with his client directly if the attorney of record was unavailable. Specifically, respondent's counsel argues that complainant's counsel should have called his client directly if complainant's counsel tried to get in touch with him personally on February 7, 1983, but could not do so. Likewise, complainant's counsel argues that respondent's counsel should have mailed a copy of the offer of reinstatement directly to complainant to assure that complainant would receive notice of the offer in sufficient time to report for work at the designated time. While it is true that when two parties in a proceeding are both represented by attorneys, each attorney is required to communicate with the other party's attorney, some common sense must prevail when the communication pertains to a matter of vital importance to an attorney's client. Therefore, when complainant's counsel received respondent's offer of reinstatement after 9 a.m. on February 7, 1983 (BPTr. 71), offering complainant a job and asking him to report for work at 8:30 a.m. on February 7, complainant's counsel had to realize that there was no way he could notify his client of the offer of reinstatement in sufficient time to permit his client to report for work at the appointed hour. Therefore, if an

immediate call to the office of respondent's attorney failed to result in a personal communication with respondent's attorney, then, at that point, complainant's attorney would have been acting in his client's interest by calling respondent's office directly to explain why his client would be unable to report for work at 8:30 a.m. Therefore, respondent's offer of reinstatement mailed on February 2, 1983, offering complainant a job on February 7, 1983, cannot be said to be at fault.

On the other hand, it is a fact that complainant did report to work about 11:30 a.m. on February 8, 1983, which was as soon as complainant could do so after he was finally advised of the offer of reinstatement by his attorney. The reason given by respondent for refusing to allow complainant to commence working on February 8, 1983, is given on page 2 of respondent's brief which states that respondent could not be expected " * * * to delay the entire operation of its business which has been doing very poorly and which was in need of immediate income in order to satisfy the needs of one particular Petitioner in this matter."

The reason given by respondent for refusing to reinstate complainant is not supported by the preponderance of the evidence. Respondent's owner, White, testified at the hearing that the primary work for which six or seven dozer operators had been recalled was reclamation work. Although his statement is somewhat confusing, he described the kind of work which the dozer operators were performing as follows (BPTr. 131):

THE WITNESS: We're mining some coal -- and reclamation work. They're not working -- they're working, doing -- for the bonding company -- and the reclamation work on the jobs. All we're doing is the reclamation right now.

White subsequently explained that Whitley Development Corporation, the respondent in this proceeding, was the entity which recalled complainant and the other dozer operators, that Whitley employed them through March 31, 1983, and that Whitley was dissolved as a corporation at that time. In such circumstances, it does not appear that the work which complainant was recalled to do was of such an urgent nature that respondent would have been unduly prejudiced in its business activities if it had hired at least one of the dozer operators with the understanding that he might not be retained if complainant should appear a day or so late because respondent's job offer was delayed in reaching complainant.

Another reason for concluding that respondent would not have been prejudiced by allowing complainant to resume his previous job as a dozer operator is that White testified that

he had recalled seven dozer operators, but that two of them (Anderson and Walker) found other work and either declined to accept White's offer of a job or left after working only a short time (BPtr. 131). Therefore, White did not actually have the full complement of dozer operators he had recalled and his reinstatement of complainant as a dozer operator would not have overly enlarged White's work force.

For the foregoing reasons, I find that respondent failed to justify its refusal to reinstate complainant to the position of a dozer operator simply because he reported 1-1/2 days late to accept the position.

Even if respondent had shown a good reason for refusing to reinstate complainant to his former position as a dozer operator, or to an equivalent position, he would still have been obligated to reinstate complainant. The Commission and the courts have held that a respondent who has violated section 105(c)(1) of the Act is obligated to reinstate the miner who has been illegally discharged. That obligation continues to exist until the discharged miner specifically declines to accept the offer of reinstatement (Glenn Munsey, 2 FMSHRC 3463 (1980); and Heinrich Motors, Inc. v. N. L. R. B., 403 F.2d 145 (2d Cir. 1968)). Therefore, I find that respondent was obligated to reinstate complainant to his former job as a dozer operator when he appeared about 11:30 a.m. on February 8, 1983, after having received notice of reinstatement on that same day.

Period of Time for Which Complainant is Entitled to Receive Back Pay

Respondent's brief (p. 3) argues that complainant is not entitled to any back pay for any period after February 8, 1983, because complainant failed to accept the offer of reinstatement in a timely manner. Respondent also notes that if I award complainant any back pay for the period after February 8, 1983, I should obtain evidence to show that complainant did not, during that period, have any income which should be offset against any back pay awarded by me.

Complainant's brief argues that respondent's offer of reinstatement was deliberately intended to give complainant such a short time period between the making of the offer and the date complainant was required to report for work, that respondent would be able to refuse to employ complainant on the ground that he had failed to accept the offer in a timely fashion. Complainant contends, therefore, that since the offer was not made in good faith, complainant is entitled to be awarded back pay for the entire period from February 8, 1983, through March 31, 1983.

I have already held in the previous topic above that respondent is obligated to reinstate complainant to his previous job, or an equivalent job, until such time as complainant specifically declines to accept reinstatement. Therefore, it is unnecessary for me to rule on complainant's argument that respondent failed to make the offer of reinstatement in good faith.

Determination of Average Hourly Week for Second Back-Pay Period

Respondent properly stated in its brief that I would have to determine for the second back-pay period whether respondent was shut down at times between February 8, 1983, and March 31, 1983, so as to produce a different hourly working week for calculation of back pay for the second period as compared with the 37.143 hourly week previously determined for the first back-pay period. Therefore, I issued an order on November 8, 1983, providing for respondent to submit information pertaining to determining the average hourly working week for the second back-pay period. The order also provided for complainant to submit an affidavit specifying what additional income, if any, he had earned during the period from February 8 through March 31, 1983.

In reply to the order of November 8, 1983, respondent submitted an affidavit stating that a review of the payroll records during the applicable period of time shows that the dozer operators employed during that period of time worked an average hourly week of 36.8 hours. Therefore, I shall hereinafter use the aforesaid average hourly week for computing back pay for the period from February 8 through March 31, 1983.

In reply to the order of November 8, 1983, complainant submitted an affidavit stating that he has not worked for any employer since May 24, 1982. Therefore, no additional offset of wages will be required to be made in computing back pay for the period from February 8 through March 31, 1983, other than the wages which were paid to complainant by B. C. McCullah Bros. and which have already been discussed on page 4 of this decision, supra.

Respondent's Motion to Dismiss Complainant's Right to Back Pay for Second Period

My order of November 8, 1983, required complainant's counsel to mail by December 2, 1983, an affidavit advising me of any income which complainant may have earned for the period from February 8 through March 31, 1983. The affidavit was not prepared until December 5 and was not mailed until December 7, 1983. Therefore, on December 14, 1983, respondent's counsel filed a motion asking that I dismiss complainant's right to back pay for the period from February 8 through March 31, 1983, for complainant's failure to comply with the time limitations in my order of November 8, 1983.

There would have been more merit to respondent's motion than there is if the sanction requested had been against complainant's counsel instead of against complainant personally. My order was mailed to complainant's counsel and the return receipt shows that complainant's counsel received the order on November 10, 1983. Although the affidavit was prepared by another attorney who appears to live in Tennessee, complainant's attorney still had a period of 22 days within which to prepare what turned out to be a two-line affidavit and mail it by December 2, 1983. The record shows that complainant only completed the first grade and that he cannot read very well (Tr. 101). Therefore, complainant could not have prepared an affidavit without the assistance of counsel and it is probably safe to conclude that complainant was unaware of the fact that his attorney had failed to prepare the affidavit in a timely fashion.

For the foregoing reasons, I believe that any sanctions for complainant's failure to submit the affidavit in a timely manner should be against complainant's counsel, rather than against complainant, who is not responsible for the lack of diligence on the part of his attorney. If complainant's counsel were asking for any attorney's fees at all for his work done in connection with the remanded back-pay issues, I would be inclined to deduct some amount from any fees which he might be requesting. As I have indicated under the heading of "Attorney's Fees", page 16, supra, complainant's counsel has waived any claim for attorney's fees in connection with the back-pay issues. Therefore, I find that the grant of respondent's motion would unduly penalize complainant because of his attorney's lack of diligence and that the motion to dismiss complainant's right to back pay for the period from February 8 through March 31, 1983, should be denied.

It should be noted that respondent is hardly in a position to be filing a motion for imposition of sanctions for failure of complainant to timely comply with my order of November 8, 1983, in view of the fact that respondent never did comply with the request in my letter of February 28, 1983, that he check my back-pay calculations submitted to him for examination. Respondent's refusal to comply with my request hereinafter forces me to make extensive back-pay and interest calculations which the Commission held was not a judge's obligation in its decision in Secretary of Labor on behalf of Milton Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2054, issued December 12, 1983, in Docket No. CENT 81-13-D. It would be most unfair for me to impose sanctions on complainant for mailing an affidavit 5 days late and ignore respondent's outright refusal to make a reply of any kind to my request that it check the back-pay calculations which were submitted to it on February 28, 1983.

CALCULATION OF BACK-PAY AND INTEREST

In its decision issued December 12, 1983, in Secretary of Labor on behalf of Milton Bailey v. Arkansas-Carbona Company, 5 FMSHRC 2042, Docket No. CENT 81-13-D, the Commission adopted for back-pay awards "* * * the interest formula used by the National Labor Relations Board--that is, interest set at the 'adjusted prime rate' announced semi-annually by the Internal Revenue Service for the underpayment and overpayment of taxes" (5 FMSHRC at 2042). The Commission stated that the interest rates adopted in its Bailey decision should be applied to all "* * * discrimination cases pending before our judges as of the date of this decision" (5 FMSHRC at 2054). The Commission also stated on page 2054 of its decision that "* * * [t]he burden of computation of interest on back pay awards should be placed primarily on the parties to the case, not the judge, in order to comport with the adversarial system."

I am fairly certain that I understand how to calculate the interest, because of the Commission's well-presented example given in footnote 15 of its Bailey decision. In any event, I believe that I shall have to assume the burden of calculating the principal amount of back pay due to complainant, as well as the interest, because, as indicated above, respondent has already declined to reply to my prior request that it review my previous back-pay calculations and I have no reason to assume that respondent would reply to a second request that it calculate the amount of back pay and interest which I have found are due to complainant. An additional reason for me to believe that I must assume the burden of making the calculations is that the Commission's Bailey decision, also at page 2054, indicates that both parties should work together in making the back-pay and interest calculations. I have found in this proceeding that there is so much hostility between respondent and complainant that there is no likelihood that I could get the parties to prepare a joint calculation of back-pay and interest. In such circumstances, I believe that it is incumbent upon me to calculate the back pay and interest as a part of this decision.

I shall include with the copies of my decision mailed to the parties a copy of the Commission's decision in the Bailey case. Providing each party with a copy of the Bailey decision will enable the parties to review my calculations, if they are inclined to do so, and correct any errors I may have made prior to the time that any back-pay amount has to be paid to complainant.

As I explained in my letter to the parties dated February 28, 1983, I am beginning my computations of back pay on July 12, 1979. The reason for starting with the date of July 12 is that the foreman testified that the dozer was not returned

from the repair shop until July 11 (Tr. 240). Inasmuch as complainant had declined the foreman's offer of an alternate type of work on July 3, 1979, the record supports a finding that, even if complainant had not been discharged on July 3, he would not have been able to operate a dozer until after the dozer had been returned from the repair shop on July 11, 1979. Therefore, the calculation of the number of days for which complainant is entitled to back pay for the first period begins with July 12, 1979, and extends to June 12, 1982, when complainant would have been laid off for economic reasons.

There must, of course, be deducted from complainant's back pay the wages he was paid by B. C. McCullah Bros., Inc., for the period from June 15, 1981, through May 25, 1982 (Exh. 1; BPtr. 21). Since complainant worked for no employer other than McCullah, it is relatively easy to make the required offsets for the wages paid to complainant by McCullah, as hereinafter shown.

Calculation of Principal Amount for First Period extending from July 12, 1979, through June 12, 1982

1979

Third Quarter

July 12 through July 31 =	14 days
August 1 through August 31 =	23 days
September 1 through September 30, excluding Labor Day (BPtr. 90) =	19 days
56 = total number of days worked in third quarter	

As I have previously explained in my decision, respondent was operating surface mines which were closed on some days because of bad weather. At other times, complainant was unable to work because the Caterpillar tractors, or dozers, which he normally operated were in the shop for repairs. Therefore, the average number of hours worked each week has been adjusted to 37.143 hours to allow for the time for which complainant would not have been paid even if he had continued to be an employee up to June 12, 1982, when he would have been laid off for economic reasons.

In order to determine the hours for which complainant should be paid on a daily basis, it is necessary to divide the average number of hours per week of 37.143 by 5 which results in a daily average number of hours of 7.429. It should be borne in mind that respondent normally worked either a 9-hour or a 10-hour day. Therefore, a reduction of the daily hours to 7.429 is a larger allowance for bad weather and equipment repair than it would appear to be if one thinks of a normal -hour working day which is used in underground coal mines.

The next step in the calculation is multiplying the number of days in the quarter (56) by the average number of hours worked (7.429) to produce a total of 416.02 hours worked in the third quarter. Multiplying 416.02 hours by \$7.50 produces \$3,120.15 which is the total back pay owed to complainant for the third quarter. The procedure here explained will be employed for calculating the back pay due for the remaining quarters.

Fourth Quarter

October 1 through October 31 =	23 days
November 1 through November 30, excluding 2 days for Thanksgiving (BPtr. 98) =	20 days
December 1 through December 31, excluding Christmas week (BPtr. 98) =	16 days
59 = number of days in fourth quarter	

438.31 = hours worked in fourth quarter (59 days x 7.429 hours)

\$3,287.32 = back pay for fourth quarter (438.31 hours x \$7.50)

82.00 = plus amount due for Christmas week (\$50 + ham
or \$32) (BPtr. 98)

\$3,369.32 = total amount of back pay due for fourth quarter

1980

First Quarter

January 1 through January 31, excluding New Year's Day =	22 days
February 1 through February 29 =	21 days
March 1 through March 31 =	21 days
64 = number of days in the first quarter	

475.46 = hours worked in first quarter (64 x 7.429 hours)

\$3,565.95 = total back pay due for first quarter (475.46
hours x \$7.50)

Second Quarter

April 1 through April 30 =	22 days
May 1 through May 31, excluding Memorial Day (BPtr. 39) =	21 days
June 1 through June 30 =	21 days
64 = number of days in the second quarter	

475.46 = hours worked in second quarter (64 x 7.429 hours)

\$3,565.95 = total back pay due for second quarter (475.46
hours x \$7.50)

1980 (Continued)

Third Quarter

July 1 through July 31, excluding July 4 (BPtr. 90) = 22 days
August 1 through August 31 = 21 days
September 1 through September 30, excluding Labor Day = 21 days

64 = number of days in the third quarter

475.46 = hours worked in third quarter (64 x 7.429 hours)

\$3,565.95 = total back pay for the third quarter (475.46 hours x \$7.50)

Fourth Quarter

October 1 through October 31 = 23 days
November 1 through November 30, excluding 2 days for Thanksgiving = 18 days
December 1 through December 31, excluding Christmas week = 18 days

59 = number of days in the fourth quarter

438.31 = hours worked in the fourth quarter (59 x 7.429 hours)

\$3,287.32 = back pay for fourth quarter (438.31 hours x \$7.50)
278.57 = plus amount due for Christmas week (1 week's salary for employees who have worked for respondent for over 1-1/2 years (BPtr. 92))

\$3,565.89 = total amount of back pay due for fourth quarter

1981

First Quarter

January 1 through January 31, excluding New Year's Day = 21 days
February 1 through February 28 = 20 days
March 1 through March 31 = 22 days

63 = number of days in the first quarter

468.03 = hours worked in first quarter (63 x 7.429 hours)

\$3,510.22 = total back pay due for first quarter (468.03 hours x \$7.50)

1981 (Continued)

Second Quarter

April 1 through April 30 = 22 days
May 1 through May 31, excluding Memorial Day = 20 days
June 1 through June 14 (since complainant began working for B. C. McCullah Bros., Inc., on June 15, 1981, and worked for McCullah Bros. through December 31, 1981 (during which period, he earned a gross amount of \$11,790.59), complainant is not entitled to any back pay from June 15 through December 31, 1981, because his earnings from McCullah Bros. were greater than the amount he would have earned if he had continued to work for respondent at \$7.50 per hour for a working week of 37.143 hours) = 10 days
52 = number of days in the second quarter

386.31 = hours worked in the second quarter (52 x 7.429 hours)

\$2,897.32 = total amount of back pay due for second quarter
(386.31 hours x \$7.50)

Third and Fourth Quarters

As explained above, complainant was working for McCullah Bros. during the third and fourth quarters of 1981. Although McCullah Bros. paid the same basic rate of \$7.50 per hour which was paid by respondent, complainant worked more hours per day for McCullah Bros. than the 7.429 hours used for calculating back pay in this proceeding. Since complainant earned more by working for McCullah Bros. than he would have received if he had continued to work for respondent, it is not necessary to award any back pay for the third and fourth quarters of 1981.

1982

First Quarter

Since complainant worked for McCullah Bros. from January 1, 1982, through May 25, 1982, during which time he earned \$8,821.88, complainant is not entitled to any back pay for that period because he worked more hours per day than the 7.429 hours being used to calculate back pay in this proceeding. Therefore, his actual earnings were greater than the amount he would have received had he continued to work for respondent.

Second Quarter

As explained above, complainant was working for McCullah Bros. through May 25, 1982. Since complainant did not have a

1982 (Continued)

Second Quarter (Continued)

job after May 25, 1982, he would have been entitled to receive back pay for the remaining days in the second quarter, except that I have hereinbefore found that complainant would have been laid off on June 12, 1982, for economic reasons even if he had not been unlawfully discharged and had continued to work for respondent. Consequently, complainant is entitled to be paid only for the period from May 26 through June 12, 1982, or for a period of 13 days, as follows:

13 = number of days in the second quarter (May 26 through June 12, 1982)

96.58 = hours worked in the second quarter (13 x 7.429 hours)

\$724.35 = total back pay due for second quarter (96.58 hours x \$7.50)

Calculation of Principal Amount for Second Period Extending from February 8, 1983, through March 31, 1983

Inasmuch as I found on pages 17-23 of this decision, supra, that complainant is entitled to back pay for the period he would have worked if respondent had not declined to reinstate him to his former position as a dozer operator when he reported for work about 11:30 a.m. on February 8, 1983, it is necessary to compute the amount of back pay complainant would have received if he had been permitted to work as long as the other dozer operators who were recalled at that time. Since the period of employment extended only from February 8 through March 31, 1983, it is necessary to compute back pay only for the first quarter of 1983. Also, since complainant did not report for work until about noon on February 8, he is entitled to be paid for only a half day on February 8.

1983

First Quarter

January 1 through January 31 is not applicable because respondent did not produce coal during that period.

February 8 through February 28 =

14-1/2 days

March 1 through March 31 =

23 days

37-1/2 = number of days in the first quarter

verage hourly week applicable for the first is 36.8 hours, as hereinbefore explained on f this decision, it is necessary to divide

36.8 by 5 to determine the average number of hours worked each day. That calculation produces an average daily number of hours of 7.36 hours.

276.0 = hours worked in the first quarter (37.5 days x 7.36 hours)

\$2,070.00 = total back pay due complainant during the year 1983
(276 hours x \$7.50)

Since complainant was unemployed during the period from February 8 through March 31, 1983, it is not necessary to deduct any earnings from other employers in computing back pay for the second period for which complainant is entitled to back pay.

Interest Calculations for Back Pay Due Complainant for 1979, 1980, 1981, 1982, and 1983

The Commission's Bailey decision, supra, explains on pages 2051 and 2052 that interest is to be calculated on a quarterly basis and that the interest is to run from the last day of each quarter for which back pay is due through the date of payment. I am calculating the interest through the first quarter of 1984, or March 31, 1984, because I have no way to determine when the back-pay reimbursement will actually be made.

The interest rates are given on page 2051 of the Bailey decision as follows:

January 1, 1978 to December 31, 1979 ...	6% per year (.0001666% per day)
January 1, 1980 to December 31, 1981 ...	12% per year (.0003333% per day)
January 1, 1982 to December 31, 1982 ...	20% per year (.0005555% per day)
January 1, 1983 to June 30, 1983	16% per year (.0004444% per day)
July 1, 1983 to December 31, 1983	11% per year (.0003055% per day)
January 1, 1984 to June 30, 1984	11% per year (.0003055% per day)

I have hereinbefore determined that complainant is entitled to the following amounts of back pay during the quarters listed below:

1979

Third quarter: \$3,120.15
Fourth quarter: \$3,369.32

1980

First quarter: \$3,565.95
Second quarter: \$3,565.95
Third quarter: \$3,565.95
Fourth quarter: \$3,565.89

1981

First quarter: \$3,510.22
Second quarter: \$2,897.32

1982

Second quarter: \$ 724.35

1983

First quarter: \$2,070.00

Total Principal Amount of Back Pay: \$29,955.10

Employing the calculation method explained by the Commission in Footnote 15 on page 2053 of the Bailey decision, supra, the interest for each quarter of back pay should be calculated as follows:

Third Quarter of 1979 through March 31, 1984

$\$3,120.15 \times 91 \text{ days} \times .0001666\% = \$ 47.30$ which is 6% interest from last day of September 1979 through December 31, 1979.

$\$3,120.15 \times 720 \text{ days} \times .0003333\% = 748.76$ which is 12% interest from January 1, 1980, through December 31, 1981.

$\$3,120.15 \times 360 \text{ days} \times .0005555\% = 623.96$ which is 20% interest from January 1, 1982, through December 31, 1982.

$\$3,120.15 \times 180 \text{ days} \times .0004444\% = 249.58$ which is 16% interest from January 1, 1983, through June 30, 1983.

$5 \times 270 \text{ days} \times .0003055\% = 257.36$ which is 11% interest from July 1, 1983, through March 31, 1984.

Total interest due on third
quarter of 1979 back pay \$1,926.96

Fourth Quarter of 1979 through March 31, 1984

\$3,369.32 x 1 day x .0001666% = \$.56 which is 6% interest on
last day of fourth
quarter of 1979.

\$3,369.32 x 720 days x .0003333% = 808.55 which is 12% interest
from January 1, 1980,
through December 31,
1981.

\$3,369.32 x 360 days x .0005555% = 673.79 which is 20% interest
from January 1, 1982,
through December 31,
1982.

\$3,369.32 x 180 days x .0004444% = 269.51 which is 16% interest
from January 1, 1983,
to June 30, 1983.

\$3,369.32 x 270 days x .0003055% = 277.91 which is 11% interest
from July 1, 1983,
through March 31, 1984.

Total interest due on fourth
quarter of 1979 back pay \$2,030.32

First Quarter of 1980 through March 31, 1984

\$3,565.95 x 631 days x .0003333% = \$749.96 which is 12% interest
from last day of March
1980 through December 31
1981.

\$3,565.95 x 360 days x .0005555% = 713.11 which is 20% interest
from January 1, 1982,
through December 31,
1982.

\$3,565.95 x 180 days x .0004444% = 285.24 which is 16% interest
from January 1, 1983,
through June 30, 1983.

\$3,565.95 x 270 days x .0003055% = 294.13 which is 11% interest
from July 1, 1983,
through March 31, 1984.

Total interest due on first
quarter of 1980 back pay \$2,042.44

Second Quarter of 1980 through March 31, 1984

$\$3,565.95 \times 541 \text{ days} \times .0003333\% = \642.99 which is 12% interest
on last day of June 1980
through December 31,
1981.

$\$3,565.95 \times 360 \text{ days} \times .0005555\% = 713.11$ which is 20% interest
from January 1, 1982,
through December 31,
1982.

$\$3,565.95 \times 180 \text{ days} \times .0004444\% = 285.24$ which is 16% interest
from January 1, 1983,
through June 30, 1983.

$\$3,565.95 \times 270 \text{ days} \times .0003055\% = 294.13$ which is 11% interest
from July 1, 1983,
through March 31, 1984.

Total interest due on second
quarter of 1980 back pay \$1,935.47

Third Quarter of 1980 through March 31, 1984

$\$3,565.95 \times 451 \text{ days} \times .0003333\% = \536.02 which is 12% interest
on last day of September 1980 through December 31, 1981.

$\$3,565.95 \times 360 \text{ days} \times .0005555\% = \713.11 which is 20% interest
from January 1, 1982,
through December 31,
1982.

$\$3,565.95 \times 180 \text{ days} \times .0004444\% = 285.24$ which is 16% interest
from January 1, 1983,
through June 30, 1983.

$\$3,565.95 \times 270 \text{ days} \times .0003055\% = 294.13$ which is 11% interest
from July 1, 1983,
through March 31, 1984.

Total interest due on third
quarter of 1980 back pay \$1,828.50

Fourth Quarter of 1980 through March 31, 1984

$\$3,565.89 \times 361 \text{ days} \times .0003333\% = \429.05 which is 12% interest
on last day of December 1980 through December 31, 1981.

Fourth Quarter of 1980 through March 31, 1984 (Continued)

\$3,565.89 x 360 days x .0005555% = 713.10 which is 20% interest
from January 1, 1982,
through December 31,
1982.

\$3,565.89 x 180 days x .0004444% = 285.24 which is 16% interest
from January 1, 1983,
through June 30, 1983.

\$3,565.89 x 270 days x .0003055% = 294.13 which is 11% interest
from July 1, 1983,
through March 31, 1984.

Total interest due on fourth
quarter of 1980 back pay \$1,721.52

First Quarter of 1981 through March 31, 1984

\$3,510.22 x 271 days x .0003333% = \$317.05 which is 12% interest
on last day of March
1981 through Decem-
ber 31, 1981.

\$3,510.22 x 360 days x .0005555% = 701.97 which is 20% interest
from January 1, 1982,
through December 31,
1982.

\$3,510.22 x 180 days x .0004444% = \$280.78 which is 16% interest
from January 1, 1983,
through June 30, 1983.

\$3,510.22 x 270 days x .0003055% = 289.54 which is 11% interest
from July 1, 1983,
through March 31, 1984.

Total interest due on first
quarter of 1981 back pay \$1,589.34

Second Quarter of 1981 through March 31, 1984

\$2,897.22 x 181 days x .0003333% = \$174.78 which is 12% interest
on last day of June 1981
through December 31, 1981.

\$2,897.22 x 360 days x .0005555% = 579.38 which is 20% interest
from January 1, 1982,
through December 31,
1982.

Second Quarter of 1981 through March 31, 1984 (Continued)

$\$2,897.22 \times 180 \text{ days} \times .0004444\% = \231.75 which is 16% interest
from January 1, 1983,
through June 30, 1983.

$\$2,897.22 \times 270 \text{ days} \times .0003055\% = 238.97$ which is 11% interest
from July 1, 1983,
through March 31, 1984.

Total interest due on second
quarter of 1981 back pay \$ 1,224.88

Second Quarter of 1982 through March 31, 1984

$\$724.35 \times 91 \text{ days} \times .0005555\% = \$ 36.61$ which is 20% interest on
last day of June 1982
through December 31, 1982.

$\$724.35 \times 180 \text{ days} \times .0004444\% = 57.94$ which is 16% interest
from January 1, 1983,
through June 30, 1983.

$\$724.35 \times 270 \text{ days} \times .0003055\% = 59.74$ which is 11% interest
from July 1, 1983,
through March 31, 1984.

Total interest due on second
quarter of 1982 back pay \$ 154.29

First Quarter of 1983 through March 31, 1984

$\$2,070.00 \times 91 \text{ days} \times .0004444\% = \$ 83.71$ which is 16% interest on
last day of March 1983
through June 30, 1983.

$\$2,070.00 \times 270 \text{ days} \times .0003055\% = 170.74$ which is 11% interest
from July 1, 1983,
through March 31, 1984.

Total interest due on first
quarter of 1983 back pay \$ 254.45

Total interest due on all
back pay from July 12,
1979, through March 31,
1984 \$14,708.17

Total back pay prior to
interest calculation \$29,955.10

Total back pay, including
interest to March 31, 1984 .. \$44,663.27

Reinstatement Obligation Continues To Exist

Toward the end of the second day of the back-pay hearings, respondent's owner testified that he was still doing some reclamation work under a different corporate name inasmuch as Whitley Development Corporation was dissolved as of March 31, 1983. Respondent's owner may be under the impression that he may continue to mine coal under a different corporate name and thereby extinguish his obligation to reinstate complainant to his former position. Respondent's owner is still obligated to reinstate complainant to his former position as a dozer operator if respondent's owner continues to have an interest in another corporate entity which continues to mine coal in the circumstances described by respondent's owner (BPtr. 136; Glenn Munsey v. Smitty Baker Coal Co., Inc., 2 FMSHRC 3463 (1980)).

WHEREFORE, it is ordered:

(A) Pursuant to the Commission's remand of the back-pay issues, respondent, or respondent's owners, within 30 days from the date of this decision, shall provide complainant with the following relief:

(1) Pay complainant back wages totaling \$29,955.10 plus interest in the amount of \$14,708.17, such interest to be modified in accordance with the method for calculating interest as explained by the Commission in its Bailey decision, supra, if payment is made before or after March 31, 1984.

(2) Provide the additional relief, including payment of attorney's fees, as set forth in my original decision at 3 FMSHRC 763 to the extent that such relief has not already been awarded.

(B) Respondent's motion to dismiss complainant's right to back pay for the period from February 8, 1983, through March 31, 1983, is denied.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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ALL PERSONS EMPLOYED BEFORE AND AFTER ELIAS MOSES EXCEPT FOR OWNER AND MEMBERS OF HIS FAMILY

1. Adkins, Danny, Sr. hired 4/3/82; quit after 3 days to return to previous job
2. Adkins, Daniel, Jr., hired 3/27/82; laid off 6/12/82
3. Alsip, James hired 3/8/80; laid off 11/22/80; worked on both day and night shifts
4. Anderson, Ottis hired 11/7/81; laid off 6/12/82
5. Archer, Jeffrey Kent hired 1/3/81; laid off 10/3/81
6. Baird, Gary Dean hired 1/3/81; laid off 6/12/82
7. Ball, Lonnie hired 9/6/80; laid off 1/17/81
8. Ball, Rick Layne hired 1/16/82; laid off 3/27/82
9. Bolton, Don hired 1/9/82; laid off 4/24/82
10. Brown, Gregory hired 7/11/81; joined Army 8/15/81
11. Bryant, Franklin hired 2/16/80; laid off 3/27/80; worked day and night shifts
12. Bunch, George W. hired 8/11/79; laid off 1/12/80 Worked only day shift
13. Campbell, Tom hired 8/22/81; left after 3 days because of back problem
14. Canada, Lester Carl hired 8/29/81; laid off 4/3/82
15. Carr, Gary hired 11/15/80; quit 3/14/81 to work for his father-in-law
16. Cash, Landy Russell hired 4/12/80
17. Chambers, Granville hired 10/24/81; quit 11/21/81 (Too far to drive.)
18. Cheek, Curtis Lee hired 1/9/82; laid off 4/17/82
19. Chinn, Homer R. hired before 5/12/79; laid off 4/4/81
20. Cornett, Harold hired before 5/12/79; laid off 9/15/79
21. Cox, Edmon Alonzo hired before 5/12/79; laid off 8/22/81 (Worked day shift)
22. Daugherty, David John hired 9/12/81; still working as shop mechanic
23. Daugherty, Jimmy Lee hired 7/4/81; laid off 6/12/82
24. Davis, James Ronald hired before 5/12/79; laid off 2/26/80 (Worked day shift only)
25. Davis, Ralph hired 3/8/80; laid off 6/9/80 (Worked night shift only)
26. Douglas, Robert hired before 5/12/79; quit 4/21/79 to take better job
27. Duncan, Edwin hired 10/3/81; laid off 4/17/82
28. Durham, Bobby hired before 5/12/79; quit 4/5/80
29. Ellis, Ralph hired 2/16/80; laid off 2/25/80 (Worked night shift only)
30. Ellison, Donald R. hired 5/20/82; still working as company engineer
31. Ellison, Richard R. hired 3/6/82; laid off 4/24/82
32. Elswick, James Edward hired 1/3/81; laid off 10/30/82
33. Foley, Clyde H. hired before 5/12/79; laid off 6/12/82
34. Foley, Clyde Jeffrey hired before 5/12/79; laid off 4/24/82
35. Goff, Wendell hired before 5/12/79; laid off 12/31/81
36. Griffith, John Earle hired 10/6/79; laid off as employee, but still works on occasion (Airplane / Pilot)
37. Hamlin, Arnold hired 5/26/79; laid off 2/6/82
38. Hamlin, Eugene hired 10/11/80; laid off 11/22/80 (Night shift only)
39. Hawn, J. B. hired 4/17/82; laid off 4/24/82
40. Hinkle, James A. hired before 5/12/79; laid off 4/4/81
41. Huckaby, William Carl hired 7/4/81; quit 10/24/81 to drive truck
42. Hudson, Bobby Lynn hired before 5/12/79; quit 1/19/80
43. Hudson, Gary hired before 5/12/79; laid off 4/24/82
44. Jones, Sydney hired 4/3/82; worked 3 days and was recalled to previous job.
45. Keith, Boyd hired 8/29/81; laid off 6/12/82
46. Kilby, David hired 4/4/81; worked 2 days and quit to return to prior job.
47. King, Francis Asbury hired 4/11/81 as foreman; quit 4/3/82 (Too long a drive to work)
48. King, George L. hired 1/9/82; laid off 4/3/82
49. Lay, Lansford hired 5/12/79; laid off 12/1/79
50. Lawson, Bobby R. hired 6/7/80; laid off 2/20/82
51. Lovitt, Donnie hired 2/7/81; quit 3/14/81
52. McClure, Gary Leon hired 9/13/80; laid off 4/17/82
53. McClure, Linda Jane hired 8/16/80; still working as office clerk or secretary
54. McClure, Richard hired before 5/12/79 as foreman; still working
55. McKee, Marion hired before 5/12/79; laid off 12/20/80
56. Magee, Vernon W. hired before 5/12/79; laid off 9/8/79
57. McNeil, Kathy L. hired before 5/12/79; quit 11/3/79 (Worked as clerk or secretary in office)
58. Meadors, James hired 12/13/80; laid off 4/24/82
59. Meadors, Kelly hired 8/16/80; laid off 6/20/81
60. Meadors, Homer S. hired before 5/12/79; has been sick for months
61. Meadors, Ora Lyle hired 11/29/80; laid off 6/20/81

ALL EMPLOYEES BEFORE AND AFTER ELIAS MOSES EXCEPT OWNER AND MEMBERS OF HIS FAMILY (CONTINUED)

62. Meadors, Robert E. hired 3/15/80; quit 9/19/81 to take job closer to his home.
63. Moore, Donald E. hired 6/27/81; laid off 4/3/82
64. Moore, Roger Allen hired 6/6/81; laid off 8/29/81
65. Morris, Allen hired 4/25/81; worked 2-1/2 days and quit
66. Moses, Arvil, Jr., hired before 5/12/79; still working as truck driver and laborer
67. Moses, Benny hired 2/23/80; laid off 4/24/80 (Worked day shift only)
68. Moses, Dwight Wayne hired 8/29/81; still working at tippie as laborer
69. Moses, Elias hired 5/12/79; discharged 6/28/79
70. Moses, Isaac hired before 5/12/79; still working at various jobs
71. Moses, Ricky hired before 5/12/79; discharged 6/6/81
72. Mullis, Earl E. hired 4/25/81; laid off 6/13/81
73. Mullis, William R., Jr. hired 11/29/80; laid off 6/13/81
74. Nelson, Danny Michael hired before 5/12/79; laid off 4/24/82
75. Nelson, Robert Ernest hired 2/7/81; quit 12/19/81
76. Newport, Eldon hired 4/3/82; worked 1 day
77. Patrick, Charles David hired 1/3/81; still working as attorney
78. Patrick, Roger hired 4/3/81; laid off 4/3/82
79. Patrick, William Albert hired 7/18/81; laid off 6/12/82
80. Payne, David hired 3/22/80; retired 6/28/80
81. Pennington, James hired 12/20/80; laid off or discharged 2/7/80
82. Perry, Leonidas Xerxes hired before 5/12/79; still working as shop mechanic
83. Petrey, Gregory Wayne hired 10/4/80; laid off 6/13/81
84. Rains, Andy hired before 5/12/79; laid off 3/28/81
85. Rose, Benjamin hired 3/8/80; laid off 2/28/81
86. Sams, Billy Ray hired 2/27/82; discharged 3/27/82 (Represented himself to be an engineer)
87. Sergeant, Dellmar hired before 5/12/79; laid off 3/27/82
88. Sergeant, Jimmy M. hired before 5/12/79; laid off 12/31/81
89. Sergeant, Kermit Dale hired before 5/12/79; quit 7/21/79
90. Smith, William Morris hired 4/10/82; laid off 7/3/82
91. Stephens, Marty Alan hired 1/17/81; laid off 6/12/82
92. Stephens, R. L. hired 11/29/80; quit 3/14/81
93. Strunk, Floyd Jr. hired 5/2/81; quit 12/31/81
94. Sulfridge, Charles, Jr. hired 6/14/80; laid off 11/21/81
95. Sulfridge, Dale W. hired 10/11/80; quit 2/7/81
96. Sulfridge, David hired 11/29/80; laid off 5/2/81
97. Sulfridge, Gary hired 3/14/81; laid off 7/18/81
98. Sulfridge, Joel Lynn hired 8/16/80; laid off 5/23/81
99. Sutton, George Alex hired after 5/12/79 or on 9/22/79; laid off 10/20/79 (Tippie operator and electrician)
100. Tackett, Billy R. hired 7/11/81; laid off 5/22/82
101. Tackett, Chester hired 8/15/81; laid off 4/19/82
102. Taylor, Stanley A. hired 9/1/79; laid off 6/5/82
103. Thacker, Dallas hired 6/21/80; laid off 9/3/80
104. Thacker, Dennis Jr. hired before 5/12/79; laid off or quit 2/27/82
105. Thacker, Estill hired 4/11/81; laid off 7/11/81
106. Thacker, Johnny Ray hired 1/10/81; laid off 1/9/82
107. Towle, Richard hired 2/25/81; laid off 3/27/82
108. Trammel, Arnold hired 5/12/79; still working as truck driver and laborer
109. Vanover, Donald hired 10/3/81; laid off 4/24/82
110. Vanover, Edgar hired 2/23/80; laid off 10/31/81
111. Vanover, Ricky hired 5/9/81; laid off 6/20/81
112. Walker, Homer D. hired 11/22/80; laid off 6/6/81; called back 8/15/81; laid off 4/24/82
113. Walker, Edward hired before 5/12/79; laid off 6/27/81 (Worked day and night shifts)
114. Walker, Raymond hired before 5/12/79; laid off 3/28/81
115. Walker, Tony Gene hired 1/31/81; laid off 5/30/81
116. Weaver, Charles hired before 5/12/79; laid off 4/29/80 (Day shift only)
117. West, Dennis hired before 5/12/79; laid off 1/20/80
118. West, Paul D. hired before 5/12/79; laid off 5/23/81
119. Williford, Lester hired 3/8/80; laid off 8/30/80 (Worked day and night shift)
120. Wilson, Donald hired after 5/12/79 or 7/14/79; laid off 6/27/81
121. Young, Lloyd, Jr. hired 4/3/82; laid off 4/17/82

EMPLOYEES HIRED BEFORE 5/12/79 OR IN 1979

<u>Employee</u>	<u>Hired</u>	<u>Laid Off</u>
1. Chinn, Homer R.	Before 5/12/79	4/4/81
2. Cornett, Harold	Before "	9/15/79
3. Cox, Edmon Alonzo	Before "	8/22/81
4. Davis, James Ronald	Before "	2/26/80
5. Douglas, Robert	Before "	Quit 4/21/79
6. Durham, Bobby	Before "	Quit 4/5/80
7. Foley, Clyde H.	Before "	6/12/82
8. Foley, Clyde Jeffrey	Before "	4/24/82
9. Goff, Wendell	Before "	12/31/81
10. Hinkle, James A.	Before "	4/4/81
11. Hudson, Bobby Lynn	Before "	Quit 1/19/80
12. Hudson, Gary	Before "	4/24/82
13. McClure, Richard	Before "	Still Working
14. McKee, Marion	Before "	12/20/80
15. Magee, Vernon W.	Before "	9/8/79
16. Meadors, Homer S.	Before "	Sick for months
17. Moses, Arvil, Jr.	Before "	Still Working
18. Moses, Isaac	Before "	Still Working
19. Moses, Ricky	Before "	6/6/81
20. Nelson, Danny Michael	Before "	4/24/82
21. Perry, Leonidas Xerxes	Before "	Still Working
22. Rains, Andy	Before "	3/28/81
23. Sergeant, Dellmar	Before "	3/27/82
24. Sergeant, Jimmy M.	Before "	12/31/81
25. Sergeant, Kermit Dale	Before "	Quit 7/21/79
26. Thacker, Dennis, Jr.	Before "	Quit 2/27/82
27. Trammel, Arnold	Before "	Still Working
28. Walker, Edward	Before "	6/27/81
29. Walker, Raymond	Before "	3/28/81
30. Weaver, Charles	Before "	4/29/80
31. West, Dennis	Before "	1/20/80
32. West, Paul D.	Before "	5/23/81
33. Lay, Lansford	5/12/79	12/1/79
34. Hamlin, Arnold	5/26/79	2/6/82
35. Wilson, Donald	7/14/79	6/27/81
36. Bunch, George W.	8/11/79	1/12/80
37. Taylor, Stanley A.	9/1/79	6/5/82
38. Sutton, George Alex	9/22/79	10/20/79

EMPLOYEES HIRED IN 1980

<u>Employee</u>	<u>Hired</u>	<u>Laid Off</u>
1. Bryant, Franklin	2/16/80	5/16/80
2. Ellis, Ralph	2/16/80	2/25/80
3. Moses, Benny	2/23/80	4/24/80
4. Vanover, Edgar	2/23/80	10/31/81
5. Alsip, James	3/8/80	11/22/80
6. Davis, Ralph	3/8/80	6/9/80
7. Rose, Benjamin	3/8/80	2/28/81
8. Williford, Lester	3/8/80	8/30/80
9. Meadors, Robert E.	3/15/80	Quit 9/19/81
10. Payne, David	3/22/80	Retired 6/28/80
11. Lawson, Bobby R.	6/7/80	2/20/82
12. Sulfridge, Charles, Jr.	6/14/80	11/21/81
13. Thacker, Dallas	6/21/80	9/3/80
14. Meadors, Kelly	8/16/80	6/20/81
15. Sulfridge, Joel Lynn	8/16/80	5/23/81
16. Ball, Lonnie	9/6/80	1/17/81
17. McClure, Gary Leon	9/13/80	4/17/82
18. Petrey, Gregory Wayne	10/4/80	6/13/81
19. Hamlin, Eugene	10/11/80	11/22/80
20. Sulfridge, Dale W.	10/11/80	Quit 2/7/81
21. Carr, Gary	11/15/80	Quit 3/14/81
22. Walker, Homer D.	11/22/80	4/24/82
23. Meadors, Ora Lyle	11/29/80	6/20/81
24. Mullis, William R., Jr.	11/29/80	6/13/81
25. Stephens, R. L.	11/29/80	3/14/81
26. Sulfridge, David	11/29/80	5/2/81
27. Meadors, James	12/13/80	4/24/82
28. Pennington, James	12/20/80	2/7/80

EMPLOYEES HIRED IN 1981

<u>Employees</u>	<u>Hired</u>	<u>Laid Off up to 12-1-82</u>
1. Archer, Jeffrey Kent	1/3/81	10/3/81
2. Baird, Gary Dean	1/3/81	6/12/82
3. Elswick, James Edward	1/3/81	10/30/82
4. Thacker, Johnny Ray	1/10/81	1/9/82
5. Stephens, Marty Alan	1/17/81	6/12/82
6. Walker, Tony Gene	1/31/81	5/30/81
7. Lovitt, Donnie	2/7/81	Quit 3/14/81
8. Nelson, Robert E.	2/7/81	Quit 12/19/81
9. Towe, Richard	2/25/81	3/27/82
10. Sulfridge, Gary	3/14/81	7/18/81
11. Patrick, Roger	4/3/81	4/3/82
12. Kilby, David	4/4/81	Quit after 2 days
13. King, Francis Asbury	4/11/81	Quit 4/3/82 (Foreman)
14. Thacker, Estill	4/11/81	7/11/81
15. Morris, Allen	4/25/81	Quit after 2-1/2 days
16. Mullis, Earl E.	4/25/81	6/13/81
17. Strunk, Floyd Jr.	5/2/81	Quit 12/31/81
18. Vanover, Ricky	5/9/81	6/20/81
19. Moore, Roger Allen	6/6/81	8/29/81
20. Moore, Donald E.	6/27/81	4/3/82
21. Daugherty, Jimmy Lee	7/4/81	6/12/82
22. Huckaby, William Carl	7/4/81	10/24/81
23. Brown, Gregory	7/11/81	Quit 8/15/81
24. Tackett, Billy R.	7/11/81	5/22/82
25. Patrick, William Albert	7/18/81	6/12/82
26. Tackett, Chester	8/15/81	4/19/82
27. Campbell, Tom	8/22/81	Quit after 3 days
28. Canada, Lester Carl	8/29/81	4/3/82
29. Keith, Boyd	8/29/81	6/12/82 laborer)
30. Moses, Dwight Wayne	8/29/81	Still working at tipple as /
31. Daugherty, David John	9/12/81	Still working as shop mechan
32. Duncan, Edwin	10/3/81	4/17/82
33. Vanover, Donald	10/3/81	4/24/82
34. Chambers, Granville	10/24/81	Quit 11/21/81
35. Anderson, Ottis	11/7/81	6/12/81

EMPLOYEES HIRED IN 1982

<u>Employees</u>	<u>Hired</u>	<u>Laid Off</u>
1. Bolton, Don	1/9/82	4/24/82
2. Cheek, Curtis Lee	1/9/82	4/17/82
3. King, George L.	1/9/82	4/3/82
4. Ball, Rick Layne	1/16/82	3/27/82
5. Ellison, Richard R.	3/6/82	4/24/82
6. Adkins, Daniel, Jr.	3/27/82	6/12/82
7. Adkins, Danny, Sr.	4/3/82	Quit after 3 days
8. Jones, Sydney	4/3/82	Quit after 3 days
9. Newport, Eldon	4/3/82	Quit after 1 day
10. Young, Lloyd, Jr.	4/3/82	4/17/82
11. Smith, William Morris	4/10/82	7/3/82
12. Hawn, J. B.	4/17/82	4/24/82

EMPLOYEES STILL WORKING FOR WHITLEY DEVELOPMENT CORPORATION AS OF
DECEMBER 1, 1982

<u>Employee</u>	<u>Hired</u>	<u>Type of Work</u>
1. McClure, Richard	Before 5/12/79	Foreman and Loader operator
2. Moses, Arvil, Jr.	Before 5/12/79	Truck driver and laborer
3. Moses, Isaac	Before 5/12/79	Various jobs and dozer operator
4. Perry, Leonidas Xerxes	Before 5/12/79	Shop mechanic
5. Trammel, Arnold	Before 5/12/79	Truck driver and laborer
6. Moses, Dwight Wayne	8/29/81	Tipple laborer and drill operator
7. Daugherty, David John	9/12/81	Shop mechanic
8. Meadors, Homer S.	Before 5/12/79	Has been ill for months

OILER

Boyd Keith	8-24-81	Laid off 6-12-82
Danny Adkins, Jr.	3-25-82	Laid off 6-12-82

LABORER

Richard Ellison	3-03-82	Laid off 4-24-82
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DOZER

Clyde H. Foley	3-09-74	Laid off 6-12-82
Isaac Moses	3-30-74	Still working as of 12/1/82
Gary Baird	12-29-80	Laid off 6-12-82
Jimmy Daugherty	7-01-81	Laid off 6-12-82
Homer Walker	8-09-81	Laid off 4-24-82
Chester Tackett	8-13-81	Laid off 4-19-82
Roger Patrick	8-31-81	Laid off 6-12-82
Edwin Duncan	9-28-81	Laid off 4-17-82
Ottis Anderson	11-04-81	Laid off 6-12-82
Don L. C. Bolton	1-04-82	Laid off 4-24-82
Curtis Cheek	1-04-82	Laid off 4-17-82
George King	1-09-82	Laid off 4-03-82
Gary Hudson	Before 5-12-79	Laid off 4-24-82

TRUCK

Arvil Moses	3-31-78	Still working as of 12/1/82
Dellmar Sergeant	10-23-78	Laid off 3-27-82
Arnold Trammel	4-20-79	Still working as of 12/1/82
James Meadors	12-11-80	Laid off 4-24-82
Gary McClure	6-01-81	Laid off 4-17-82
Donald Moore	6-24-81	Laid off 4-03-82
Lester Canada	8-24-81	Laid off 4-03-82
Donald Vanover	10-01-81	Laid off 4-24-82
Rick Ball	1-16-82	Laid off 3-27-82
Lloyd Young	3-31-82	Laid off 4-17-82

Page 2 of 2

LOADER

Richard McClure	7-02-75	Still working as of 12/1/82
Clyde Jeffrey Foley	5-21-79	Laid off 4-24-82
Danny Nelson	2-02-81	Laid off 4-24-82
Gary Hudson	11-23-81	Laid off 4-24-82
George King	1-04-82	Laid off 4-03-82

MECHANIC

David Daugherty	9-08-81	Still working as of 12/1/82
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TIPPLE

James Elswick	12-22-80	Laid off 10-30-82
Marty Stephens	1-14-81	Laid off 6-12-82

DRILL

Albert Patrick	2-15-82	Laid off 6-12-82
Wayne Moses	3-22-82	Still working as of 12/1/82

FOREMAN

Stanley Taylor	8-28-79	Laid off 6-12-82
Billy Tackett	7-06-81	Laid off 5-22-82

HIRED 1979Before 5-12-79

Chinn, Homer R.	4-4-81
Cornett, Harold	9-15-79
Cox, Edmon Alonzo	8-22-81
Davis, James Ronald	2-26-80
Douglas, Robert	quit 4-21-79
Durham, Bobby	quit 4-5-80
Foley, Clyde H.	6-12-82
Foley, Clyde Jeffrey	4-24-82
Goff, Wendell	12-31-81
Hinkle, James A.	4-4-81
Hudson, Bobby Lynn	quit 1-19-80
Hudson, Gary	4-24-82
McClure, Richard	still working/foreman
McKee, Marion	12-20-80
Magee, Vernon W.	9-8-79
McNeil, Kathy L.	quit 11-3-79
Meadors, Homer S.	has been sick for months
Moses, Arvil, Jr.	still working/truck driver/laborer
Moses, Isaac	still working/various jobs
Moses, Ricky	6-6-81
Nelson, Danny Michael	4-24-82
Perry, Leonidas Xerxes	still working/shop mechanic
Rains, Andy	3-28-81
Sergeant, Dellmar	3-27-82
Sergeant, Jimmy	12-31-81
Sergeant, Kermit Dale	quit 7-21-79
Thacker, Dennis Jr.	2-27-82
Walker, Edward	6-27-81
Walker, Raymond	3-28-81
Weaver, Charles	4-29-80
West, Dennis	1-20-80
West, Paul D.	5-23-81

MAY

12	Lay, Lansford	12-1-79
	Moses, Elias	
	Trammel, Arnold	still working/truck driver/laborer
26	Hamlin, Arnold	2-6-82

JULY

14	Wilson, Donald	6-27-81
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	George W.	1-12-80
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	*anley A.	6-5-82
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22	Sutton, George Alex	10-20-79
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OCTOBER

6	Griffith, John Earle	- laid off but works on occasion/pilot.
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HIRED 1980FEBRUARY

16 Bryant, Franklin 3-27-80
Ellis, Ralph 2-25-80

23 Moses, Benny 4-24-80
Vanover, Edgar 10-31-81

DECEMBER

13 Meadors, James 4-24-82

20 Pennington, James 2-7-80

MARCH

8 Alsip, James 11-22-80
Davis, Ralph 6-9-80
Rose, Benjamin 2-28-81
Williford, Lester 8-30-80

15 Meadors, Robert E. quit 9-19-81

22 Payne, David retired

APRIL

12 Cash, Landy Russell

JUNE

7 Lawson, Bobby R. 2-20-82

14 Sulfridge, Charles, Jr. 11-21-81

21 Thacker, Dallas 9-3-80

AUGUST

16 McClure, Linda Jane still working/office
Meadors, Kelly 6-20-81
Sulfridge, Joel Lynn 5-23-81

SEPTEMBER

6 Ball, Lonnie 1-17-81

13 McClure, Gary Leon 4-17-82

OCTOBER

4 Petrey, Gregory Wayne 6-13-81

11 Hamlin, Eugene 11-22-80
Sulfridge, Dale W. quit 2-7-81

NOVEMBER

15 Carr, Gary quit 3-14-81

22 Walker, Homer D. 4-24-82

29 Meadors, Ora Lyle 6-20-81
Mullis, William R. 6-13-81
Stephens, R. L. 3-14-81
Sulfridge, David 5-2-81

JANUARY

FEBRUARY

MARCH

APRIL

MAY

JUNE

JULY

AUGUST

SEPTEMBER

OCTOBER

NOVEMBER

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HIRED 1982JANUARY

9	Bolton, Don	4-24-82
	Cheek, Curtis Lee	4-17-82
	King, George L.	4- 3-82
16	Ball, Rick Layne	3-27-82

MARCH

6	Ellison, Richard R.	4-24-82
27	Adkins, Daniel, Jr.	6-12-82

APRIL

3	Adkins, Danny, Sr.	quit 4-6-82
	Jones, Sydney	quit 4-6-82
	Newport, Eldon	quit 4-4-82
	Young, Lloyd, Jr.	4-17-82
10	Smith, William Morris	7-3-82
17	Hawn, J. B.	4-24-82

LAI D OFF - DISCHARGED1979

April 21 Douglas, Robert
 July 21 Sergeant, Kermit Dale
 Sept. 8 Magee, Vernon W.
 Sept. 15 Cornett, Harold
 Oct. 20 Sutton, George Alex
 Dec. 1 Lay, Lansford

1980

Jan. 12 Bunch, George W.
 Jan. 19 Hudson, Bobby Lynn
 Jan. 20 West, Dennis
 Feb. 7 Pennington, James
 Feb. 25 Ellis, Ralph
 Feb. 26 Davis, James Ronald
 March 27 Bryant, Franklin
 April 5 Durham, Bobby
 April 24 Moses, Benny
 April 29 Weaver, Charles
 June 9 Davis, Ralph
 June 28 Payne, David
 Aug. 30 Williford, Lester
 Sept. 3 Thacker, Dallas
 Nov. 22 Alsip, James
 Hamlin, Eugene
 Dec. 20 McKee, Marion

1981

Jan. 17 Ball, Lonnie
 Feb. 7 Sulfridge, Dale W.
 Feb. 28 Rose, Benjamin
 March 14 Carr, Gary
 Lovitt, Donnie
 Stephens, R. L.
 March 28 Rains, Andy
 Walker, Raymond

1981 (continued)

April 4 Chinn, Homer R.
 Hinkle, James A.
 April 6 Kilby, David
 April 28 Morris, Allen
 May 2 Sulfridge, David
 May 23 Sulfridge, Joel Lynn
 West, Paul D.
 May 30 Walker, Tony Gene
 June 6 Moses, Ricky
 Walker, Homer D. (called
 back 8/15/81 and laid
 off again 4/24/82).
 June 13 Mullis, Earl E.
 Mullis, William R., Jr.
 Petrey, Gregory Wayne
 June 20 Meadors, Kelly
 Meadors, Ora Lyle
 Vanover, Ricky
 June 27 Walker, Edward
 Wilson, Donald
 July 11 Thacker, Estill
 July 18 Sulfridge, Gary
 Aug. 15 Brown, Gregory
 Aug. 22 Cox, Edmon Alonzo
 Aug. 29 Moore, Roger Allen
 Sept. 19 Meadors, Robert E.
 Oct. 3 Archer, Jeffrey Kent
 Oct. 24 Huckaby, William Carl
 Oct. 31 Vanover, Edgar
 Nov. 21 Chambers, Granville
 Sulfridge, Charles, Jr.
 Dec. 19 Nelson, Robert Ernest
 Dec. 31 Goff, Wendell
 Sergeant, Jimmy M.
 Strunk, Floyd, Jr.

1982

Jan. 9 Thacker, Johnny Ray

LAI D OFF - DISCHARGED1982 (continued)

Feb. 6 Hamlin, Arnold
Feb. 20 Lawson, Bobby R.
Feb. 27 Thacker, Dennis, Jr.

March 27 Ball, Rick Layne
Sergeant, Dellmar
Towe, Richard

April 3 Canada, Lester Carl
King, Francis Asbury
King, George L.
Moore, Donald E.
Patrick, Roger

April 4 Newport, Eldon

April 6 Adkins, Danny, Sr.
Jones, Sydney

April 17 Cheek, Curtis Lee
Duncan, Edwin
McClure, Gary Leon
Young, Lloyd, Jr.

April 19 Tackett, Chester

April 24 Bolton, Don
Ellison, Richard R.
Foley, Clyde Jeffrey
Hawn, J. B.
Hudson, Gary
Meadors, James
Nelson, Danny Michael
Vanover, Donald
Walker, Homer D.

May 22 Tackett, Billy R.

June 5 Taylor, Stanley A.

June 12 Adkins, Daniel, Jr.
Anderson, Ottis
Baird, Gary Dean
Daugherty, Jimmy Lee
Foley, Clyde H.
Keith, Boyd
Patrick, William Albert
Stephens, Marty Alan

July 3 Smith, William Morris

Oct. 30 Elswick, James Edward

HIRED 1979Before 5-12-79

Chinn, Homer R.	
Cornett, Harold	
Cox, Edmon Alonzo	
Davis, James Ronald	
Douglas, Robert	
Durham, Bobby	
Foley, Clyde H.	6-12-82
Foley, Clyde Jeffrey	4-24-82
Goff, Wendell	
Hinkle, James A.	
Hudson, Bobby Lynn	
Hudson, Gary	4-24-82
McClure, Richard	
McKee, Marion	
Magee, Vernon W.	
Meadors, Homer S.	
Moses, Arvil, Jr.	
Moses, Isaac	
Moses, Ricky	
Nelson, Danny Michael	4-24-82
Perry, Leonidas Xerxes	
Rains, Andy	
Sergeant, Dellmar	3-27-82
Sergeant, Jimmy	
Sergeant, Kermit Dale	
Thacker, Dennis, Jr.	2-27-82
Walker, Edward	
Walker, Raymond	
Weaver, Charles	
West, Dennis	
West, Paul D.	

MAY

12	Lay, Lansford	
	Trammel, Arnold	

26	Hamlin, Arnold	2- 6-82
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JULY

14	Wilson, Donald	
----	----------------	--

AUGUST

11	Bunch, George W.	
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SEPTEMBER

1	Taylor, Stanley A.	6- 5-82
22	Sutton, George Alex	

HIRED 1980FEBRUARY

16 Bryant, Franklin
Ellis, Ralph

23 Moses, Benny
Vanover, Edgar

MARCH

8 Alsip, James
Davis, Ralph
Rose, Benjamin
Williford, Lester

15 Meadors, Robert E.

22 Payne, David

JUNE

7 Lawson, Bobby R. 2-20-82

14 Sulfridge, Charles, Jr.

21 Thacker, Dallas

AUGUST

16 Meadors, Kelly
Sulfridge, Joel Lynn

SEPTEMBER

6 Ball, Lonnie

13 McClure, Gary Leon 4-17-82

OCTOBER

4 Petrey, Gregory Wayne

11 Hamlin, Eugene
Sulfridge, Dale W.

NOVEMBER

15 Carr, Gary

22 Walker, Homer D. 4-24-82

29 Meadors, Ora Lyle
Mullis, William R.
Stephens, R. L.
Sulfridge, David

DECEMBER

13 Meadors, James 4-24-82

20 Pennington, James

HIRED 1981JANUARY

3 Archer, Jeffrey Kent
 Baird, Gary Dean 6-12-82
 Elswick, James Edward 10-30-82

10 Thacker, Johnny Ray 1- 9-82

17 Stephens, Marty Alan 6-12-82

31 Walker, Tony Gene

FEBRUARY

7 Lovitt, Donnie
 Nelson, Robert Ernest

25 Towe, Richard 3-27-82

MARCH

14 Sulfridge, Gary

APRIL

3 Patrick, Roger 4- 3-82

4 Kilby, David

11 King, Francis Asbury
 Thacker, Estill

25 Morris, Allen
 Mullis, Earl E.

MAY

2 Strunk, Floyd, Jr.

9 Vanover, Ricky

JUNE

6 Moore, Roger Allen

27 Moore, Donald E. 4- 3-82

JULY

4 Daugherty, Jimmy Lee 6-12-82
 Huckaby, William Carl

11 Brown, Gregory
 Tackett, Billy R. 5-22-82

18 Patrick, William Albert 6-12-82

AUGUST

15 Tackett, Chester 4-19-82

22 Campbell, Tom

29 Canada, Lester Carl 4- 3-82
 Keith, Boyd 6-12-82
 Moses, Dwight Wayne

SEPTEMBER

12 Daugherty, David

OCTOBER

3 Duncan, Edwin 4-17-82
 Vanover, Donald 4-24-82

24 Chambers, Granville

NOVEMBER

7 Anderson, Ottis 6-12-82

HIRED 1982JANUARY

9 Bolton, Don 4-24-82
Cheek, Curtis Lee 4-17-82
King, George L. 4-3-82

16 Ball, Rick Layne 3-27-82

FEBRUARY

27 Sams, Billy Ray 3-27-82

MARCH

6 Ellison, Richard R. 4-24-82

27 Adkins, Daniel, Jr. 6-12-82

APRIL

3 Adkins, Danny, Sr.
Jones, Sydney
Newport, Eldon
Young, Lloyd, Jr. 4-17-82

10 Smith, William Morris 7-3-82

17 Hawn, J. B. 4-24-82

MAY

20 Ellison, Donald R.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAR 13 1984

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-22-M
Petitioner	:	A.C. No. 05-03663-05501
v.	:	
	:	J Ramah Mine a/k/a Ramah Mill
RAMAH MINES COMPANY,	:	
Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U. S. Department of Labor, Denver, Colorado,
for Petitioner
(Respondent failed to appear)

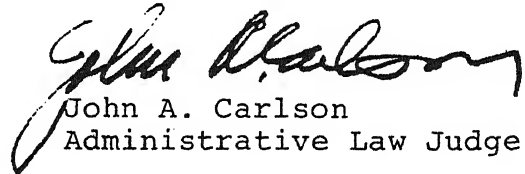
Before: Judge Carlson

A hearing on the merits in this civil penalty proceeding was set for February 8, 1984 at 1:30 p.m. in the Commission's hearing room in Denver, Colorado. The hearing was duly convened as scheduled, but no appearance was made on behalf of the respondent operator. At 2:05 p.m. the Secretary was permitted to put on his case through the person of Mr. Michael Lynham, a metal-nonmetal mine inspector. Lynham's testimony indicated that the Ramah Mine and Mill, at the time of his April 7, 1981 inspection, had no telephone or radio as a means of emergency communication, as required by the mandatory safety standard published at 30 C.F.R. § 55.18-13. He further testified that the mine no longer operates. The Secretary rested at 2:20 p.m., at which time counsel moved for the entry of a default judgment. The motion was taken under advisement and the hearing was adjourned.

By order issued on February 9, 1984, respondent's representative was notified that a decision affirming the citation and assessing the \$20.00 civil penalty proposed by the Secretary would be entered by default unless respondent showed good cause for its failure to appear. The time for response is now long past and nothing has been filed.

ORDER

Accordingly, respondent is declared to be in default for failure to appear; citation number 574164 is affirmed; and respondent shall pay within 30 days of the date of this decision a civil penalty of \$20.00.


John A. Carlson
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor,
U. S. Department of Labor, 1585 Federal Building,
1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Guy C. Curtis, Esq., Curtis & Curtis
P O Box 547, Imperial, Nebraska 89033 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

MAR 14 1984

EDDIE LEE SHARP, : DISCRIMINATION COMPLAINT
Complainant :
: Docket No: WEVA 82-399-D
: MSHA Case No: CD 82-27
v. :
: Stone Run Mine No. 6
:
MAGIC SEWELL COAL COMPANY, :
Respondent :

DECISION AWARDING BACK PAY, ETC.

Appearances: Eddie Lee Sharp, Elkins, West Virginia,
Complainant;
John L. Henning, Esq., Elkins, West Virginia,
for Respondent;

Before: Judge Moore

At the hearing in the above case respondent's safety director, who was neither an officer of the company nor an owner, testified that the company was out of business and had no assets. Although offered the opportunity to submit a financial statement subsequent to the hearing, the company did not do so. Nor has it responded to Mr. Sharp's post-decision claim for back wages and other expenses. Therefore, even though the judgement may turn out to be uncollectable, I am nevertheless issuing this decision requiring the payment of back pay and expenses. No reinstatement is possible inasmuch as the company is out of business. If the company maintains any records, it is ORDERED to purge those records of derogatory material concerning the illegal discharge of Mr. Sharp.

Mr. Sharp is not entitled to all of the back pay claimed by him. He is entitled to back pay from the date he was discharged, August 6, 1982 to the date the company went out of business on January 7, 1983. This is a total of 22 weeks and one day. During the first 2 weeks Mr. Sharp would have received a salary of \$525 for each week. During the remaining twenty weeks Mr. Sharp received \$168 a week in unemployment benefits which, subtracted from the sum of \$525 leaves \$357. \$357 for twenty weeks is \$7,140 and this, added to the \$1,050 Mr. Sharp would have received during the first 2 weeks amounts to \$8,190 in back wages. Adding payment for August 6 (at \$105 per day) brings this to \$8,295. Mr. Sharp estimates that he drove 150 miles in connection with the preparation of this case and at the standard rate allowed by the United States government of 20.5 cents a mile the travel expenses would be \$30.75. The total judgement is for \$8,325.75 plus interest.

The interest will be calculated in accordance with the formula set forth in the Commission's decision Secretary of Labor on behalf of Milton Bailey vs. Arkansas Carbon Company, 5 FMSHRC 2042, 2051-2053 (December 12, 1983). Copies of the 3 cited pages from the decision are attached hereto and made a part hereof. 1/. I do not personally understand the calculations but I am sure that if there are assets in this case, that MSHA will assist Mr. Sharp in obtaining enforcement of the order. The services of an accountant can be secured and he should be able to calculate the proper interest with the aid of a Hewlett-Packard computer, an abacus, and if necessary a ouija board. In any event, the interest can not be computed until the date of payment is known.

It is hereby ORDERED that respondent pay to Mr. Eddie Lee Sharp, within 30 days, the sums mentioned above with interest at the appropriate rate continuing until the day of payment.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

Mr. Eddie Lee Sharp, Aero Trailer Park, Rt. 1, Box 274-36,
Elkins, W VA 26241 (Certified Mail)

John L. Henning, Esq., 320 Randolph Avenue, P.O. Box 5,
Elkins, W VA 26241 (Certified Mail)

1/

In my opinion the Commission did not use the percent sign correctly in the Arkansas-Carbona case. I have circled the percent signs that I think should be eliminated. In attempting to duplicate the results set forth in footnote 15 of that opinion, I found that the percent signs caused my calculations to be off by 2 decimal places. For example, if the annual percentage rate is 16% and using a 360 day year that the Commission prescribed, the daily percentage rate is .04444%; the figure used in multiplication, however, to obtain that percentage, is .0004444.

Attachments

The relevant adjusted prime rates, which we adopt as the Commission's remedial interest rates, are:

January 1, 1978 to December 31, 1979...6% per year (.0001666~~6~~ per day)
January 1, 1980 to December 31, 1981...12% per year (.0003333~~3~~ per day)
January 1, 1982 to December 31, 1982...20% per year (.0005555~~5~~ per day)
January 1, 1983 to June 30, 1983.....16% per year (.0004444~~4~~ per day)
July 1, 1983 to December 31, 1983.....11% per year (.0003055~~5~~ per day)
January 1, 1984 to June 30, 1984.....11% per year (.0003055~~5~~ per day)

Because the IRS rates of interest are announced as annual rates, it is necessary, as explained below, to convert them to daily rates to calculate interest on periods of less than one year. 13/

There must also be a uniform method of computing the interest on back pay awards under the Mine Act. We have considered a number of possible computational approaches. We are mindful of the NLRB's extensive administrative and legal experience in this area. The NLRB's general back pay methodology is sound and has met with judicial approval. The labor bar is familiar with this system. We conclude that rather than expending administrative resources in attempting to devise a new system, we will best, and most efficiently, effectuate the remedial goals of section 105(c) of the Mine Act by adopting the major features of the NLRB computational system. We are satisfied that this system will do justice to the miner, avoid unnecessary penalization of the operator, and not prove unduly burdensome for our judges and bar to apply.

We therefore announce the following general rules for the computation of interest on back pay.

Back pay and interest shall be computed by the "quarterly" method. See Florida Steel Corp., 231 NLRB at 652; F.W. Woolworth Co., 90 NLRB 289 (1950), approved NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953). 14/

13/ Prior to the passage of the Tax Equity and Fiscal Responsibility Act of 1982, the IRS announced the adjusted prime rate in October of the appropriate year to take effect the following February. For ease of administration under the Mine Act, however, we have bounded certain interest periods at December 31 and January 1 rather than at January 31 and February 1. (The NLRB's General Counsel has followed the same simplifying approach. NLRB Memorandum GC 83-17, August 8, 1983.)

14/ Back pay is the amount equal to the gross pay the miner would have earned from the operator but for the discrimination, less his actual interim earnings. Bradley v. Belva Coal Co., 4 FMSHRC 982, 994-95 (June 1982). The first figure, the gross pay the miner would have earned, is termed "gross back pay." The third figure, the difference resulting from subtraction of actual interim earning from gross back pay, is "net back pay"--the amount actually owing the discriminatee. Interest is awarded on net back pay only.

In a discrimination case where, as here, there has been an illegal discharge, the back pay period normally extends from the date of the discrimination to the date a bona fide offer of reinstatement is made. (As we conclude below, the period may also be tolled when the discriminatee waives the right to reinstatement.)

Under this method (referred to as the "Woolworth formula," after the NLRB's decision in the case of the same name, supra), computations are made on a quarterly basis corresponding to the four quarters of the calendar year. Separate computations of back pay are made for each of the calendar quarters involved in the back pay period. Thus, in each quarter, the gross back pay, the actual interim earnings, if any, and the net back pay are determined. See n. 14.

Interest on the net back pay of each quarter is assessed at the adjusted prime interest rate or rates in effect, as explained below. Like the NLRB, we will assess only simple interest in order to avoid the additional complexity of compounding interest. Interest on the amount of net back pay due and owing for each quarter involved in the back pay period accrues beginning with the last day of that quarter and continuing until the date of payment. See Florida Steel Corp., 231 NLRB at 652. In calculating the amount of interest on any given quarter's net back pay, the adjusted prime interest rates may vary between the last day of the quarter and the date of payment. If so, the respective rates in effect for any quarter or combination of quarters must be applied for the period in which they were operative. The interest amounts thus accrued for each quarter's net back pay are then summed to yield the total interest award.

For administrative convenience, we will compute interest on the basis of a 360-day year, 90-day quarter, and 30-day month. Using these simplified values, the amount of interest to be assessed on each quarter's net back pay is calculated according to the following formula:

$$\frac{\text{Amount of interest}}{\text{number of accrued days of interest (from the last day of that quarter to the date of payment)}} = \frac{\text{The quarter's net back pay}}{\text{daily adjusted prime rate interest factor}} \times$$

The "daily adjusted prime rate interest factor" is derived by dividing the annual adjusted prime rate in effect by 360 days. For example, the daily interest factor for the present adjusted prime rate of 11% is

.0003055%)(.11/360). The daily interest factors are shown in the list of adjusted prime rates above. A computational example is provided in the accompanying note. 15/

15/ The mechanics of the quarterly computation system may be illustrated by the following hypothetical example, in which a miner is discriminatorily discharged on January 1, 1983, and offered reinstatement on September 30, 1983. Payment of back pay and interest is tendered on October 15, 1983. After subtraction of the relevant interim earnings, the net back pay of each quarter involved in the back pay period is as follows:

First quarter (beginning January 1, 1983)	\$1,000
Second quarter (beginning April 1, 1983)	\$1,000
Third quarter (beginning July 1, 1983)	\$1,000
Total net back pay	<u>\$3,000</u>

The adjusted prime interest rates in effect in 1983 are:

16% per year (.0004444% per day) from January 1, 1983, to June 30, 1983;
11% per year (.0003055% per day) from July 1, 1983, to December 31, 1983.

The interest award on the net back pay of each of these quarters is as follows:

(1) First Quarter:

(a) At 16% interest until end of second quarter of 1983:

\$1,000 net back pay x 91 accrued days of interest
(last day of first quarter plus the entire second quarter) x .0004444 = \$40.44

Plus,

(b) At 11% interest for entire third quarter through the date of payment:

\$1,000 net back pay x 105 accrued days of interest (the third quarter plus 15 days) x .0003055 = \$32.07

(c) Total interest award on first quarter:

\$40.44 + \$32.07 = \$72.51

(2) Second Quarter

(a) At 16% interest for the last day of the second quarter
\$1,000 x 1 accrued day of interest x .0004444 = \$.44

Plus,

(b) At 11% interest for the entire third quarter through date of payment:

\$1,000 x 105 accrued days of interest x .0003055 = \$32.07

(c) Total = \$.44 + \$32.07 = \$32.51

(3) Third Quarter:

At 11% interest for the last day of the third quarter
through date of payment:

1,000 x 16 accrued days of interest x .0003055 = \$4.88 total

Interest Award:

+ 32.51 + 4.88 = \$109.90

Added to the total amount of back pay (\$3,000), for a total of \$3,109.90.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 16 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 83-44
Petitioner	:	A.C. No. 01-00340-03536
	:	
v.	:	Gorgas America No. 7 Mine
	:	
ALABAMA BY-PRODUCTS	:	
Respondent	:	

DECISION DENYING MOTION TO WITHDRAW PLEADINGS BUT APPROVING SETTLEMENT

Before: Judge Fauver

The parties have moved to withdraw their pleadings on the ground that Respondent has tendered payment of the full civil penalty petitioned by the Secretary.

Sufficient grounds have not been shown for a withdrawal of the pleadings. Accordingly, the motion to withdraw is DENIED. The parties' motion is, in effect, and will be considered as a motion to approve settlement by payment of the civil penalty petitioned by the secretary.

This case involves a single charge of a violation under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Respondent is cited for a violation of 30 CFR § 75.400 because of loose coal and coal dust accumulations in the No. 3 miner section. The Secretary's Narrative Findings for a Special Assessment state that the accumulations extended about 180 feet in the heading entry and in the Nos. 1 and 2 left entries, that they were 4 to 10 inches deep in the entries and connecting crosscuts, that they constituted a serious violation because of a risk of fire or explosion, and that the violation was due to negligence because the condition was readily observable and should have been detected by the mine examiner, reported and cleaned up. Respondent demonstrated a good faith effort to achieve rapid abatement of the cited condition. In the 24-month period preceding the date of the charge Respondent had a total of 316 charges of violations in 670 inspection days.

I find that the amount of penalty proposed, \$750, is consistent with the statutory criteria for civil penalties and is supported by the record. Accordingly, the settlement will be approved.

ORDER

WHEREUPON IT IS ORDERED that Respondent shall pay a civil penalty of \$750 within 30 days of the Decision, and upon such payment this proceeding is DISMISSED.

William Fauver

William Fauver
Administrative Law Judge

Distribution:

George Palmer, Esq., Office of the Solicitor, U.S. Department of Labor, 1929 South Ninth Avenue, Birmingham, AL 35205
(Certified Mail)

J. Fred McDuff, Esq., Alabama By-Products Corporation, P.O. Box 10246, Birmingham, AL 35202 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAR 19 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 84-24
Petitioner	:	A.C. No. 15-11065-03518
v.	:	
	:	No. 10 Mine
SHAMROCK COAL COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Neville Smith, Esq., Manchester, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act" for one violation of the regulatory standard at 30 C.F.R. § 75.302(a). The general issue before me is whether Shamrock Coal Company, Inc. (Shamrock) has violated the cited regulation as alleged and if so what is the appropriate penalty to be assessed.

The one citation at bar, No. 2193845, alleges inadequate ventilation in the numbers 1, 2, and 3 working places on the 004 section of Shamrock's No. 10 Mine. In particular, it alleges as follows:

Line brattice were not installed adequately to provide perceptible air movement to the faces of such places. The brattices were installed but they ended forty to seventy feet outby the faces and did not extend out into the last open crosscut to deflect any air into the places.

The cited standard reads as follows:

Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners, and to remove flammable, explosive, and noxious gasses, dust, and explosive fumes, unless the Secretary or his authorized representative permits an exception to this requirement, where such exception will not pose a hazard to the miners. When damaged by falls or otherwise, such line brattice or other devices shall be repaired immediately.

Shamrock appears to argue that the so-called Nos. 1, 2 and 3 "working places" were not "working faces" within the meaning of the regulations and therefore there was no violation. "Working face" is defined in the regulations as "any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle." 30 C.F.R. § 75.2(g)(1).

The mining cycle at Shamrock's No. 10 Mine includes the sequential preparation and extraction of coal in six entries numbered 1-6. The actual extraction and loading is performed with a continuous miner. The newly mined area is then immediately bolted and other work such as cleaning up, erecting brattice, testing for methane and taking site lines may then take place before the cycle is repeated in each of the six entries. The continuous miner usually performs its phase of the cycle in 20 to 30 minutes and a complete cycle in all six entries will usually take between 2 and 4 hours.

Within this framework it is apparent that although the continuous miner was not operating in working places Nos. 1-3 and no other work was then being performed in any of those places when the citation was issued those places were nevertheless places in which work of extracting coal was performed during the mining cycle. Those places were accordingly "working faces."

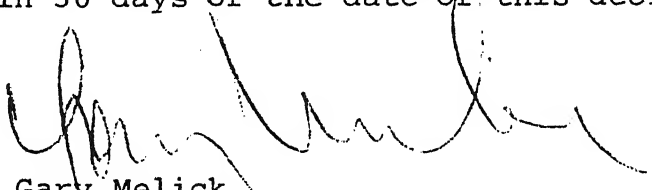
Shamrock next appears to argue that even if the cited areas were indeed "working faces" there was sufficient line brattice in place at the Nos. 1, 2 and 3 places to provide adequate ventilation to remove "flammable, explosive or noxious gasses, dust or explosive fumes." The credible evidence does

not, however, support the argument. MSHA Inspector James Brashear testified without contradiction that there was no perceptible movement of air when he cited the working places. While he acknowledged there had not been a history of methane at the subject mine and that there was generally "good air" in the working sections, it is apparent that there was then insufficient ventilation to have removed coal dust or other gases and fumes from the face areas. It appears to be the intent of the standard to provide continuing ventilation of lingering coal dust, methane and other flammable and/or noxious gases in areas in which miners may continue to be working throughout the mining cycle. Accordingly, I find that the violation is proven as charged.

I accept the testimony of MSHA Inspector Brashear that the hazard in this particular case was minimal in that there has been no history of dangerous methane levels at this mine, that there was minimal dust at the faces, and that there is customarily "good air" in the cited section. I note that while the operator has been previously cited for the same violation the citations have all been contested for the purpose of having the issue presented for determination by an administrative law judge. The citation at bar is apparently the first to reach hearing. Under the circumstances, I find low negligence. The operator is of medium size and has a moderate history of violations. Accordingly, I find that a penalty of \$50 is appropriate.

ORDER

Shamrock Coal Company, Inc., is ordered to pay a civil penalty of \$50 within 30 days of the date of this decision.



Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

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Neville Smith, Esq., P.O. Box 447, Manchester, KY 40962
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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAR 20 1984

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-191-M
Petitioner	:	A.C. No. 04-04521-05002 F
v.	:	
	:	Denson Mine
KENNETH DENSON,	:	
Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
U. S. Department of Labor, San Francisco, California,
for Petitioner;
(Respondent failed to appear).

Before: Judge Vail

STATEMENT OF THE CASE

This civil penalty proceeding was filed by the Secretary of Labor (Secretary) against Kenneth Denson (Denson) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards. Pursuant to an Order to Show Cause dated December 2, 1982, Denson sent a letter dated December 19, 1982, which letter has been accepted as his answer to the Secretary's petition. In this answer, Denson stated that he thought the proposed penalties were considerable and that payment would cause him financial distress.

Notice of Hearing was mailed to the parties on March 3, 1983 setting the hearing for July 7, 1983. The Secretary filed a motion requesting that the hearing be continued to a later date. An order rescheduling the hearing was issued on May 23, 1983, setting the matter for July 20, 1983 in Sacramento, California. The Counsel for the Secretary appeared at the hearing on the day and at the time set. Denson failed to appear. Prior to the hearing date, numerous unsuccessful attempts were made to contact Denson by telephone. Also, Denson had refused to accept certified letters mailed to him with a return receipt attached. The last Notice of Hearing was sent by both certified mail and regular mail.

After waiting a period of time, Counsel for the Secretary advised the Judge that he had two witnesses present and wished to proceed with the hearing and present his evidence. This was granted.

On July 28, 1983, an order was sent to Denson to show cause why he should not be held in default for his failure to appear at the hearing and have penalties assessed against him. Denson replied by letter received in my office on September 1, 1983 and stated that his wife had marked the wrong date for the hearing on his calendar. He included the July page of a 1983 calendar showing the date of July 26, 1983 as the date for the hearing.

Denson further stated that he did not wish to have everybody go to the expense of another hearing and again stated his argument that high penalty assessments in this case would cause him extreme financial hardship. I accept his reply to the Order as consent on his part to have a determination made on the record in this case without the need for a second hearing. A copy of the above letter and attachments were forwarded to the Secretary for his comments but none were forthcoming.

ISSUES

The issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding; and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) The operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

DISCUSSION

On June 30, 1981, an accident occurred at the Denson Mine located approximately 12 miles north of Nevada City, Nevada. A 1964 Hough Model 120C, serial No. 1210383, front-end loader driven by Gary Gray went over the edge of an elevated roadway falling into the pit at the mine. Gray suffered severe injuries, including the loss of one leg. A second employee, Edward Grebel, who was riding on the loader, was killed.

During an investigation of this accident on July 7, 1981, MSHA Inspector Thomas Hubbard issued to Denson, as owner and operator of the Denson Mine, a 107(a) order No. 601630 charging a violation of 30 C.F.R. § 55.9-3. 1/ This order removed the Hough front-end loader involved in the accident from service due to defective brakes. On the same day, citation no. 601631 was issued alleging a violation of 30 C.F.R. § 55.9-22 2/ for failure to have a berm on the elevated roadway into the pit.

The evidence shows that Gray and Gerber were new employees of Denson at his gold mine. On June 3, 1981, Gray was driving the front-end loader and showing Gerber how it operated. They had driven to the refueling area, filled the tank and were proceeding down the elevated road into the pit when the engine quit. This caused a loss of the hydraulic steering power. The loader went over the side of the elevated road and fell 15 feet into the pit. Both Gray and Gerber were pinned under the machine.

During a conversation between MSHA Inspectors Hubbard and George W. Constanich, testified to at the hearing, Denson admitted the brakes on the front-end loader were very poor (Transcript at 10 and 21). Also, Constanich observed the repairs made to the brakes of the Hough front-end loader which involved replacement of a grease seal on the right front wheel, replacement of a brake fluid line, and adding fluid to the brake system (Exhibit P33).

Both inspector Hubbard and Constanich testified that the elevated roadway into the pit at the Denson Mine lacked any type or semblance of a berm. The roadway was 10 to 18 feet wide, 200 yards in length, and had approximately a 4 percent grade from the top to the pit floor. At the point where the loader went over the side, it was approximately 15 feet from the edge of the roadway to the pit floor (Tr. at 9, 28).

I find that the evidence establishes the two violations, the one contained in citation No. 601630 for defective brakes and that described in 601631 as to the lack of a berm on the elevated roadway. Denson never denied these charges in either his letter of December 2, 1982 treated as an answer, or in the one received by me on September 1, 1983. Denson did allege in the latter letter that the State of California's penalties for the same violation was "about \$170.00" based on lack of evidence to prove the charge of defective brakes on the loader. However, I have

1/ 55.9-3 Mandatory. Powered mobile equipment shall be provided with adequate brakes.

2/ 55.9-22 Mandatory. Berms or guards should be provided on the outer bank of elevated roadways.

found that the evidence does prove the brakes were defective on the Hough front-end loader from the testimony of the two MSHA inspectors.

PENALTIES

I find that the evidence establishes that the Denson Mine is a small gold mine employing two miners to work with the owner-operator. There is no history of prior violations as this was a new mine listing with MSHA.

As to negligence, I find that Denson was negligent in allowing two new men to operate the Hough front-end loader without adequate brakes. The testimony of the inspectors proves Denson knew the brakes were as he stated "very poor."

The lack of a berm on the elevated roadway is evidence also that Denson was negligent, as this would be obvious to him as he was working at the pit with the employees.

The gravity of the violations is serious as evidenced by the resulting injuries to Gray and death of Grebel. Either effective brakes or a berm on the elevated roadway could have prevented this accident. Both factors contributed to the result.

The Secretary proposed a penalty of \$4,000.00 be assessed for the violation of § 55.9-3 and a penalty of \$2,500.00 for a violation of § 55.9-22. Denson contends that penalties of this size would cause him extreme financial hardship. At the hearing, the Secretary recognized that this was Denson's main defense and agreed to the receipt in the hearing record of Denson's income tax returns for 1981 and 1982. These returns show that Denson suffered a financial loss during both years. Also, presented as evidence was the fact that Denson had a large trust deed (loan) against the land on which the mine was located and that these payments were a financial hardship.


There is sufficient evidence in this case that the imposition and collection of large penalties against Denson would affect his ability to continue in business. Also, the evidence shows that Denson did demonstrate good faith in achieving compliance with the Act.

For the above two reasons and the fact that this is a small mining operation, a reduction in the amount of the penalties proposed by the Secretary is warranted. However, the degree of negligence and the gravity of these violations cry out for penalties that would be effective in securing the cooperation of this operator

in following the Act in the future. The fact that it is a small operation with only two employees and in financial trouble does not alone warrant small penalties. The Act is designed to protect the health and safety of miners working in small mines as well as those in the larger ones, and probably is needed more than the larger more responsible mine operators do. I find that a penalty of \$200.00 for the violation in citation No. 601630 and \$200.00 for the violation in citation No. 601631 is reasonable and appropriate in each instance.

ORDER

The respondent is ORDERED to pay civil penalties in the total amount of \$400.00 within 40 days of the date of this decision and order, and upon receipt by MSHA, this case is dismissed.


Virgil E. Vail
Administrative Law Judge

Distribution:

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
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MAR 22 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 81-42-M
Petitioner	:	A.C. No. 39-00055-05039
	:	Docket No. CENT 81-43-M
	:	A.C. No. 39-00055-05041
	:	Docket No. CENT 81-84-M
	:	A.C. No. 39-00055-05044
v.	:	Docket No. CENT 81-85-M
	:	A.C. No. 39-00055-05045
	:	Docket No. CENT 81-207-M
	:	A.C. No. 39-00055-05054 I
	:	Docket No. CENT 81-251-M
	:	A.C. No. 39-00055-05055
	:	Docket No. CENT 81-278-M
HOMESTAKE MINING COMPANY,	:	A.C. No. 39-00055-05056
Respondent	:	
	:	Homestake Mine

DECISION

Appearances: Eliehue C. Brunson, Esq., Office of the Solicitor,
U.S. Department of Labor, Kansas City, Missouri,
for Petitioner;
Robert A. Amundson, Esq., Amundson & Fuller,
Lead, South Dakota,
for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

These consolidated seven cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* In each case, the Secretary seeks to have a civil penalty assessed for an alleged violation of mandatory safety standard. An evidentiary hearing was held in Lead, South Dakota.

At the commencement of the hearing, the parties advised the Judge that they had entered into an agreement to settle a number of citations in the above cases. It was agreed that a written stipulation would be submitted following the hearing presenting the settlement agreement and the reasoning and rationale therefor. On February 13, 1984, the parties submitted a joint motion to dismiss and approve settlement of designated citations in most of the above cases. The provisions of this settlement agreement are discussed further in this decision.

In spite of the settlement of many of the contested citations, several remained to be tried and the hearing proceeded. Based upon the entire record and considering all of the arguments of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

ISSUES

The principal issues presented are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of the filed civil penalties; and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria as set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

STIPULATIONS

The parties stipulated to the following:

1. Homestake Mining Company operates a gold mine of substantial size in Lead, South Dakota.
2. Petitioner has jurisdiction of these cases under the Federal Mine Safety and Health Act.
3. Respondent received the citations, contested them and also received notice of time and place of hearing.
4. The assessment and payment of penalties in these cases would not affect the ability of the operator to continue in business.

Docket No. CENT 81-42-M

The parties agreed to a settlement of two of the three citations contained in this case as follows:

Citation No. 329587 was issued June 10, 1980 alleging a

violation of 30 C.F.R. § 57.6-1 and proposing the assessment of a penalty of \$170.00. This citation concerned an allegation that five cardboard boxes of electrical blasting caps were observed sitting on a bench on the rib of 29 crosscut at the 5600 level in respondent's mine. They were not stored in the day box. It is stipulated that the caps were stored in protective containers used when in transit and the caps were unlikely to explode. The settlement proposed that the penalty be reduced to \$20.00 and given a non-significant and substantial designation. In light of the explanation, this settlement is approved.

Citation No. 330473 was issued on June 11, 1980 for an alleged violation of 30 C.F.R. § 57.6-127 and a proposed penalty of \$255.00. This concerned a blasting box which was not located in the area in which the blast would be set off but rather 125-150 feet away. Since this box was not connected for blasting or in an area designated to have blasts set off, the parties stipulated that it should be classified as a non-significant and substantial violation and the penalty reduced to \$20.00. Based upon the above explanation, this settlement is approved.

Citation No. 330225 was not a part of the proposed settlement agreement and was tried at the hearing set for this day. Petitioner issued this citation alleging a violation of 30 C.F.R. § 57.12-30 which provides as follows:

Mandatory. When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

MSHA Inspector Guy L. Carsten testified that on June 11, 1980, while inspecting 50-52 stope, 21 ledge off the 6200 level, he observed a slit in the outer jacket of the 110 volt electrical power cable to the slusher lights. The slusher lights were unplugged and hanging on a rockbolt. Carsten was of the opinion that they had been used or were going to be used (Transcript at 150, 151).

Respondent argues that the petitioner failed to prove that the cited slusher lights had been recently used or were going to be used and therefore a violation of 57.12-30 had not occurred. James Baumann, respondent's shift boss, testified that he had been along on this inspection with Carsten. He stated that the cited lights had been removed from service and a new one was hanging on the opposite side of the slusher (Tr. at 164).

The specific issue is whether the petitioner has carried his burden of proof in showing that the defective slusher lights had been used in its defective condition or were going to be used. Carstens testified that the lights were unplugged and hanging on the wall. When asked if he remembered seeing other slusher

lights in this particular area, he answered that he was not sure but that one of the stopes had two sets of slusher lights in it (Tr. at 154). Baumann testified that the defective lights being in the stope was a housekeeping problem as a new set hanging on the opposite wall of the slusher was facing out in the stope and were the lights that had been used (Tr. 164).

I find no violation occurred here. The petitioner's evidence did not prove that respondent had used the defective lights or was going to use them in their defective condition and therefore did not violate the standard. I find that respondent's witness Baumann's testimony credible as to the other replacement lights being in the stope and that Carsten's memory on this point vague. Citation No. 330225 is vacated.

Docket No. 81-43-M

The parties agreed to a settlement of all six citations listed in this case as follows:

Citation No. 329591 was issued on June 12, 1980 alleging a violation of standard 30 C.F.R. § 57.19-106 with an original assessed penalty of \$255.00. It is proposed that it be settled for \$20.00 and considered a non-significant and substantial violation. This citation involved maintenance work that had been in progress for an extended period of time and little chance of injury to miners. It is approved.

Citation No. 329593 was issued June 17, 1980 alleging a violation of 30 C.F.R. § 57.11-1 with an original assessed penalty of \$150.00. It is now proposed that it be settled for \$20.00 and considered a non-significant and substantial violation. This involved safe access to a stope which actually had been abated by the shift boss with installation of the required barrier prior to issuance of the citation. This is approved.

Citation No. 330476 was issued June 18, 1980 for an alleged violation of 30 C.F.R. § 57.11-4 and a proposed penalty assessment of \$140.00. It was proposed that this citation be vacated due to the MSHA inspector who issued the citation being unavailable to testify. This citation is vacated.

Citation Nos. 567053 and 567056 involve alleged violations of the same standard, 30 C.F.R. § 57.12-2 and proposed assessments of a penalty of \$114.00 respectively. In the settlement agreement, the parties represent that the electrical fuse boxes cited in these instances as not being bolted to the wall of the stope were in fact wired firmly thereto. The standard is silent as to the method required to fasten fuse boxes and probability of injury was extremely low so it is proposed that both citations be settled for \$20.00 each and amended to be a non-significant and substantial violation. This settlement is approved.

Citation No. 566924 was issued on June 27, 1980 for an

alleged violation of 30 C.F.R. § 57.12-30 and a proposed penalty of \$160.00. The disconnect switch on number 9 ledge, 4250 level, had a damaged door preventing the box from being either opened or closed. It was agreed that respondent pay the full amount of the original proposed penalty of \$160.00 in settlement of this citation with no change in the original citation language. This is approved.

Docket No. CENT 81-84-M

In Citation No. 329842, issued March 16, 1980, the petitioner alleges a violation of 30 C.F.R. § 57.9-2 which reads as follows:

Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

MSHA Inspector Jeran Sprague testified that while riding on top of the counter-balance in the Ross Shaft of respondent's mine, he observed several loose guides and bolts between the 1700 and 2600 levels (Tr. at 178, 179). In the condition part of the citation, Sprague stated there were other guides and bolts loose from 2600 to 3550 level (Exhibit P-17). Several bolts were exhibiting evidence of having rubbed against the counter-balance as they were shiny (Tr. at 186). Sprague contended that this created a hazard as the counter-balance could catch on the protruding bolts and tear out hundreds of feet of guides causing material to fall down the shaft onto the man cage and possibly causing injuries to miners.

Respondent contends that if a violation of safety standard § 57.9-22 had occurred, the equipment defect would have to be corrected before the equipment could be used. In this case, the inspection was conducted on Saturday, March 16, 1980, and respondent was given until March 23, 1980 for abatement. Further, that the citation was actually terminated on June 21, 1980 (Exh. P-17).

The most credible evidence in this case establishes that while conducting a shaft inspection of the counter-weight compartment in the Ross Shaft, the inspector observed loose guides in the area from 1700 to 2600 foot level and also 2600 to 3550 level. I find that such condition, based upon the inspectors experience and expertise, warranted respondent to take corrective action and the issuance of citation No. 329842 for a violation of § 57.9-2. However, I do not find that the weight of the evidence supports the petitioner's contention that this violation was significant and substantial within the guide lines established by the Commission in Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981). This test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. I find the testimony of the inspector unpersuasive as to the probability

of a potential for injury in the immediate future resulting from the condition of the equipment cited. Further, William Stratton, respondent's shift foreman, testified that it is unlikely that a bolt used to hold the guides in place, and three-quarters of an inch thick, would impede the movement of a 40,000 to 60,000 pound counter-weight (Tr. at 217). Also, the guides were described as being tongue and grooved at the joints and unlikely to come loose even if a bolt were severed (Tr. at 216, 217). It is also respondent's policy to inspect the shafts at the Homestake mine every week and usually find thirty to fifty loose guide bolts during an inspection (Tr. at 219). From this testimony which was most credible, I find no evidence to support a contention that the violation was significant or substantial. I also find a low degree of negligence and gravity. I find that a penalty of \$50.00 is appropriate in this case.

Docket No. CENT 81-85-M

There are four citations included in this case.

Citation No. 329836, was issued on December 9, 1979 for a violation of 30 C.F.R. § 57.11-12 and a proposed penalty of \$195.00. The parties represented that this violation concerned whether or not an area cited was a travelway requiring a guard rail. Evidence established that the area was an emergency escapeway not used in three years and with little probability of a resulting injury as a result of this violation. The parties agreed to settle this citation for \$20.00. This settlement is approved. The remaining three citations, were tried at the hearing.

Citation No. 330834 issued August 28, 1980 alleges a violation of 30 C.F.R. § 57.9-2 which states as follows:

Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

MSHA inspector Iver A. Iverson testified that he observed what he considered was a defective plug on the cord that connects the Mancha battery motor No. 068 to the batteries. It was described in the citation as an electrical burn and shock hazard to miners operating the equipment due to damage in the internal grounding device within the quick lock connector. This could cause an arcing between the male and female connector shell (Exh. P-1).

During the inspection, the motorman was requested to disconnect the plug which operation might occur several times during the day. Usually the motorman does this while standing in the cab. However, at this time, the operator could not perform this task from the cab and had to get outside and use considerable force to remove the plug. Iverson opined that when the battery is put on charge in the battery station, any arcing could cause a hazard in the dead-end drift where these stations are located (Tr. at 20).

Respondent argues that the petitioner failed to carry his burden of proof to show that the cited electrical connection was a defect affecting safety. In support thereof, Kermit Kidder, respondent's electrical maintenance engineer, testified that he was familiar with the equipment cited, and that the outside case of the two connecting brass parts is the part that grounds it to the motor (Tr. at 113). The pitting inside the connectors described by the inspector was considered by Kidder to indicate a bad connection in the past (Tr. at 113).

I find that the evidence of record in this case fails to support the alleged violation of § 57.9-2 described in the citation. The specific issue is whether the defect described therein affected the safety of any miners. The evidence established that the connector was difficult to disconnect and according to inspector Iverson's testimony contained "several pits and scars, which raise the ... increase the surface." (Tr. at 29). The evidence is conflicting as to whether there was any electrical defect in this connector. Iverson admitted he did not test it for a leakage to ground (Tr. at 30). In his opinion there had been or was "arcing" but such an opinion was based on what he said was an oxidized, or possible arcing spot around the inner perimeter of the plug (Tr. at 29). He considered this would allow leakage through the internal grounding system into the frame or motor. Respondent's witness denied that the internal grounding system was as described by the inspector and based upon his electrical engineering degree and experience, I am persuaded that his knowledge was more credible. I find that at most the evidence shows the respondent had a maintenance problem through wear and use in this part. The equipment was not ordered removed from service. When the inspector was asked as to the probability of an occurrence or an incident leading to an accident from the condition he cited, he testified as follows: "The use that these motors are put to, and the probability of that happening, would probably be nil. I'd have to say that, in my experience. But if it did happen, it would destroy equipment and there's possible burn hazard to the operator." (Tr. at 40). I do not find a violation proven in this case and citation No. 330834 is vacated.

Citation No. 330835 issued August 28, 1980 alleges a violation of standard 30 C.F.R. § 57.6-177 which reads as follows:

Mandatory. Misfires shall be reported to the proper supervisor. The blast area shall be dangered-off until misfired holes are disposed of. Where explosives other than black powder have been used, misfired holes shall be disposed of as soon as possible

by one of the following methods:

- (a) Washing the stemming and charge from the borehole with water;
- (b) Reattempting to fire the holes if leg wires are exposed; or
- (c) Inserting new primers after the stemming has been washed out.

Inspector Iverson testified that while inspecting 40-42 F stope, 11 ledge and 4850 stope at respondent's mine, he observed blue and yellow leg wires protruding from a hole in a recently blasted area. Further inquiries revealed that this area had been blasted on a previous night shift and that the misfire was not discovered until the next night shift. Two shifts had worked in the area during this time with evidence that miners had been slushing ore within 20 feet of the misfire.

Petitioner argues that these miners should have seen the wires the inspector saw and reported it to their supervisor and removed the misfires. Respondent contends that no one saw the misfire and therefore no violation occurred. Also, if it had been seen it would have been corrected immediately.

I find the evidence of record establishes that a misfire occurred and that the operator did not correct this condition prior to the inspector observing it. The record does not contain any proof that the respondent or any of its employees in that area were aware of this condition existing in the stope. It is surprising that with the several shifts entering this stope following the blast, and the admission that miners look for these conditions, that it wasn't observed prior to the inspector arriving. Apparently it should have been observed as the inspector saw it shortly after entering the area.

Regardless of respondent's argument that it was without notice, I find this is not a defense. First, I am convinced the wires should have been seen by the miners and supervisors working in that area and careful inspection of the area would have revealed the misfire. Also, the Commission has held that an operator may be held liable for a violation of a mandatory safety standard regardless of a showing of fault. Unless the standard so requires, a showing of negligence has no bearing in the issue of whether a violation occurred but is a factor to be considered in assessing a penalty. El Paso Rock Quarries, Inc., 3 FMSHRC 38-39 (January 1981).

I find that the violation of § 57.6-177 stated in Citation No. 330835 did occur and that a penalty of \$255.00 is appropriate in this case.

Citation No. 330861 was issued on September 10, 1980 for a violation of 30 C.F.R. § 57.14-7 which reads as follows:

Mandatory. Guards shall be of substantial construction and properly maintained.

Respondent was cited for not having a cable guard or other device on a tugger.

Inspector Iverson testified he observed a miner operating the tugger by reaching across the cable to move the handle to engage the motor. He states that a guard would prevent clothing or parts of the operator's body from becoming entangled in the rotating drum and winding cable. Iverson believed that a guard, such as the guide which was observed laying near the tugger, would be adequate.

Respondent contends that the cable guide was intended as a spooling device for the cable as it was rolled on the drum during operation. Respondent further contends that there is no requirement that there be a guard on the tugger.

I find that the most credible evidence in this case supports the arguments of the respondent. First, the tugger is not manufactured with guards installed as suggested by the inspector. The tugger is used as a source of power to pull objects by cable and is operated at a very slow speed. The handle located on one side is spring-loaded so that when pushed forward it causes the drum upon which the cable is wound to move in one direction. When the handle is pulled the other direction, it reverses the drum direction. When the lever is released, it returns to center and the tugger motor stops. The purpose of the guide which the inspector required be put on the tugger was designed to guide the cable onto the drum. It's purpose is not that of a guard at a pinch point. Based upon these facts, I find that there was not a violation of the standard cited in this instance and Citation No. 330861 is vacated.

Docket No. CENT 81-207-M

The parties agreed to a settlement of the one Citation No. 329331 in this case. This citation was issued for a violation of 30 C.F.R. § 57.18-2 as a result of a build-up of water in a bore hole. The explanation for such occurrence was that an unknown and unexpected thaw occurred over the weekend. Petitioner agreed to reduce the original proposed penalty of \$1,075.00 to \$538.00 as he felt the negligence was not as great as originally thought. That settlement is approved.

Docket No. CENT 81-251-M

Citation No. 330687 issued March 10, 1981 alleged a violation of 30 C.F.R. § 57.12-6 and proposed a penalty of \$98.00. In the settlement agreement dated February 13, 1984, petitioner represents that the MSHA inspector had previously vacated the citation and respondent did not object. Therefore, Citation No. 330687 is vacated.

Docket No. CENT 81-278-M

Three citations were included in this case and all were settled by the parties in the stipulation and joint motion to approve settlement dated February 13, 1984.

Citation No. 329908 was issued on April 29, 1981 for a violation of 30 C.F.R. § 57.12-82 and a proposed penalty of \$122.00. Based upon recommendation of the MSHA inspector issuing the citation, it is vacated.

Citation Nos. 330645 and 330646 issued on May 12, 1981 each allege violations of 30 C.F.R. § 57.12-25 which involved equipment not being grounded to provide protection for miners working in the area. Petitioner agreed in settlement of these two citations to reduce the penalties by 25% due to respondent's good faith and prompt action in abating the violations. Citation No. 330645 originally proposing a penalty of \$170.00, is reduced to \$127.00 and citation No. 330646 with a proposed penalty of \$180.00 is reduced to a penalty of \$130.00. These settlements are approved.

CONCLUSIONS OF LAW

Docket No. CENT 81-42-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement or Decision</u>
329587	6/10/80	57.6-1	\$170	\$20.00
330225	6/11/80	57.12-30	84	Vacated
330473	6/11/80	57.6-127	255	20.00
				<u>\$40.00</u>

Docket No. CENT 81-43-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement or Decision</u>
329591	6/12/80	57.19-106	\$255	\$ 20.00
329593	6/17/80	57.11-1	150	20.00
330476	6/18/80	57.11-4	140	Vacated
567053	6/24/80	57.12-2	114	20.00
567056	6/25/80	57.12-2	114	20.00
566924	6/27/80	57.12-30	160	160.00
				<u>\$240.00</u>

Docket No. CENT 81-84-M

<u>Citation No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	<u>Decision</u>
329842	3/16/80	57.9-2	\$305	\$50.00

Docket No. CENT 81-85-M

<u>Citation No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	Settlement or <u>Decision</u>
329836	12/09/79	57.11-12	\$195	\$ 20.00
330834	8/28/80	57.9-2	106	Vacated
330835	8/28/80	57.6-177	255	255.00
330861	9/10/80	57.14-7	98	Vacated
				<u>\$275.00</u>

Docket No. CENT 81-207-M

<u>Citation No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	Settlement or <u>Decision</u>
329331	12/24/80	57.18-2	\$1,075	\$538.00

Docket No. CENT 81-251-M

<u>Citation No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	Settlement or <u>Decision</u>
330687	3/10/81	57.12-6	\$98	Vacated

Docket No. CENT 81-278-M

<u>Citation No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	Settlement or <u>Decision</u>
329908	4/29/81	57.12-82	\$122	Vacated
330645	5/12/81	57.12-25	170	\$127.00
330646	5/12/81	57.12-25	180	130.00
				<u>\$257.00</u>

ORDER

It is ORDERED that the citations so listed above are vacated. Respondent is ORDERED to pay civil penalties for the remaining citations in the amounts shown above in satisfaction thereof. Payment in the total amount of \$1,400.00 is to be made within forty (40) days of this decision and order. Upon receipt of payment by the petitioner, these proceedings are dismissed.

Virgil E. Vail
Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 83-9
Petitioner : A.C. No. 34-01317-03502
v. :
TURNER BROTHERS, INC., : Docket No. CENT 83-13
Respondent : A.C. No. 34-01317-03503
: Heavener No. 1 Mine

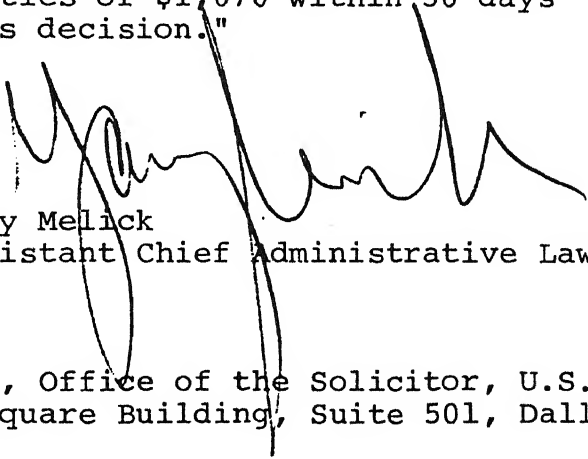
ORDER AMENDING DECISION

Appearances: Allen Reid Tilson, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for
Petitioner;
Robert J. Petrick, Esq., Turner Brothers, Inc.,
Muskogee, Oklahoma, for Respondent.

Before: Judge Melick

The final decision issued in these proceedings on
December 12, 1983, is hereby amended to correct a clerical
mistake, Commission Rule 65(c), 29 C.F.R. § 2700.65(c).
Accordingly, the Order on page 8 is corrected to read as
follows:

"In accordance with the Decision in this
case, Turner Brothers, Inc., is hereby ordered
to pay civil penalties of \$1,070 within 30 days
of the date of this decision."


Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

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of Labor, 555 Griffin Square Building, Suite 501, Dallas, TX
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAR 22 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 82-311
Petitioner : A.C. No. 36-03425-03502
v. :
U.S. STEEL MINING CO. INC., : Maple Creek No. 2 Mine
Respondent :

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., United States Steel
Corporation, Pittsburgh, Pennsylvania, for
Respondent.

Before: Judge Melick

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act", for nine alleged violations of regulatory standards. The general issues before me are whether the U.S. Steel Mining Company, Inc. (U.S. Steel) has violated the cited regulatory standards and, if so, whether those violations are "significant and substantial" as defined in the Act and as interpreted by the Commission in Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). If it is determined that violations have occurred, it will also be necessary to determine the appropriate penalty to be assessed for those violations. Evidentiary hearings were held in this case in Washington, Pennsylvania.

Citation Nos. 1145289, 1249704, and 1249705 allege violations of the regulatory standard at 30 C.F.R. § 75.200. That standard provides in part that the "roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." The standard also requires the operator to adopt a roof control plan and violations of the plan have been held to be violations of the standard. See e.g. Secretary v. Southern Ohio Coal Co., 4 FMSHRC 1459 (1982).

Citation No. 1145289 more particularly charges as follows:

There was a dislodged roof bolt in the No. 16 split in No. 15 room of the eight flat five RM section MMV 011. The area of unsupported mine roof was approximately 6 1/2 feet by 7 1/2 feet of mine roof. The roof was loose and drummy at this location.

According to the Secretary, the manner in which the roof was inadequately supported also violated the following specific provisions of the operator's roof control plan:¹

All resin-grouted rods shall be used with bearing plates approved for use at the mine. Bearing plates shall be installed tight against the roof, header blocks, crossbars, or other bearing surface material after resin is cured. Tight against the roof means that the plate cannot be rotated 360 degrees using normal hand pressure. (Exhibit P-12, page nine, paragraph 2b).

MSHA Inspector Francis Wehr testified that on April 6, 1982, during the course of a regular inspection of the Maple Creek No. 2 Mine, he observed a dislodged roof bolt hanging

¹ Respondent argues in its posthearing brief that the citation did not allege a violation of its roof control plan. It did not, however, contend at hearing that it did not receive sufficient notice of the violation to prepare its defense and did not request a continuance for such purpose. Moreover, the citation does allege facts which if true could constitute a violation of the operator's roof control plan and refers on its face to the standard alleged to have been violated. The citation herein accordingly comports with section 104(a) of the Act, which requires that "each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." I find, moreover, that adequate notice was provided within the framework of Constitutional due process. See S.S. Kresge Company v. NLRB, 416 F.2d 1225 (6th Cir. 1969); NLRB v. United Aircraft Corporation, 490 F.2d 1105 (2nd Cir. 1973). Finally, the evidence herein supports a violation of the cited standard for inadequate roof support independent of the roof control plan.

from the roof in the cited area. As he later clarified, the bolt itself was intact but its 6 inch square bearing plate was loose and could be turned a full 360°. The roof surrounding the dislodged bearing plate was admittedly "loose and drummy" thus indicating to Wehr that an unsafe condition existed. Although the mine was not then in production, supervisory personnel were working in the immediate vicinity of the dislodged bearing plate. Wehr opined that it was reasonably likely that material would fall from the roof surrounding the loose bearing plate, thereby injuring and possibly killing mine personnel.

Samuel Cortis, Respondent's district chief mine inspector, disagreed about the hazard associated with the loose bearing plate. According to Cortis, the bearing plate holds only the loose material around the plate itself and provides no additional support for the roof bolt. Even assuming that Cortis is correct, it is undisputed that the bearing plate does protect from debris falling from the area in close proximity to it. Accordingly, I find that a violation of the roof control plan and the general provisions of 30 C.F.R. § 75.200 has occurred as charged and that it was "significant and substantial" and a serious hazard. National Gypsum, supra; Secretary v. Consolidation Coal Co., 6 FMSHRC _____, (January 13, 1984).

According to Wehr, the bearing plate had been dislodged by a nearby continuous mining machine.² He reasoned that since the mine had been in a nonproducing status for several days, the condition had existed for that period of time and should have been discovered during interim preshift examinations. This analysis is not disputed and accordingly supports a finding of negligence.

Citation No. 1249704 also alleges a violation of the standard at 30 C.F.R. § 75.200 and states as follows: "There was a violation of the approved roof control plan in the No. 47 RM just inby split 39 of the two flat 47 room section

² Respondent also argues in its brief that since the bearing plate became dislodged sometime after it was installed, the evidence does not show a violation of that part of the roof control plan requiring that bearing plates be installed tight against the roof. The suggested construction is, however, too narrow. It is implicit in the language of the plan that the bearing plates must continue to be tight against the roof even after the initial installation. There was in any event as previously noted a violation of section 75.200 for inadequate roof support independent of the roof control plan.

MMD004 in that two of the three temporary supports (roof jacks) were more than four feet from the first row of temporary supports. The left jack was five feet eight inches and second jack on right side was five feet away from the first temporary support installed in the working place. This condition was left from 12:00 a.m. to 8:00 a.m. shift." More specifically, it was alleged at hearing that the cited conditions violated the roof control plan at Page 14, Drawing No. 2. (Ex. P-12).

The evidence supporting this violation is undisputed. According to Paul Gaydos, assistant mine foreman, two of the temporary jacks were admittedly out of compliance. Gaydos disagreed, however, with the probability assessment of a roof fall under the circumstances. He opined that you could not determine that a violation was "significant and substantial" where two of the jacks were placed only about a foot out of position.

Inspector Wehr did not appear to disagree that the temporary supports were misplaced by only 6 inches to a foot but he nevertheless maintained that because of the existence of a slip in a clay vein in the nearby roof, additional support should have been provided. The credibility of this position suffers, however, by the fact that Wehr did not require such additional support for the abatement of the violation. He required only that the temporary support be repositioned. Under the circumstances, I find that the Secretary has failed in his burden of proving that the violation was "significant and substantial". I further must conclude that the hazard was only of moderate gravity. The facts in Secretary v. Consolidation Coal Company, supra., are clearly distinguishable. I agree with Inspector Wehr, however, that the preshift examiner should have seen the cited condition and corrected it. Under the circumstances, the operator was negligent.

Citation No. 1249705 also alleges a violation of the roof control plan charging in particular that "in the sixth flat right straight section MMV012 * * * the diagonal distance of three intersections (1) at four room 33 split exceeded 32 feet for one diagonal distance (33 feet 9 inches) (2) at 32 split in a track entry exceeded 32 feet for one diagonal distance (34 feet) (3) at split 30 in C entry exceeded 32 feet for one diagonal distance (34 feet 6 inches) and posts or cribs were not installed to reduce the one diagonal distance to 32 feet or less as required by the plan."

Inspector Wehr observed that slips, weakened strata, and a cavity with cracks or separations also appeared in the roof within the cited areas. The hazard was serious in his opinion because of the existence in each of the cited intersections of these weakened roof conditions and based on his experience that roof falls tend to occur more frequently in intersections. It is undisputed that the intersections were frequently travelled by miners.

According to Samuel Cortis, the operator's district chief mine inspector, there is no "magical formula" for establishing the maximum safe diagonal distance in intersections. Cortis observed that the roof control plans at this mine were originally approved by MSHA to allow a sum-of-the-diagonals at 64 foot but there had been some intersection failures at that length and MSHA required a shortening of the distance to 58 feet. He claims that based on his experience there has been no difference in intersection failures between 58 foot and 64 feet sum-of-the-diagonal distances. This testimony does not, however, address the situation faced in this case. These violations concern excess distances on one leg of the diagonal. The testimony of Inspector Wehr regarding the hazards associated with the excess diagonal distance accordingly remains un rebutted. Under the circumstances, I find that a serious hazard existed herein and that the violation was "significant and substantial". I also find that the operator was negligent in failing to detect and correct what was an easily discoverable violation. The condition was abated in a timely manner when posts and cribs were installed in all the cited locations thereby reducing the diagonals in the cited intersections to within the prescribed distance.

Citation No. 1249706 alleges a violation of the standard at 30 C.F.R. § 75.514 and specifically charges as follows: "suitable connectors were not used in the power wiring going to the off and on switch for the stammer coal feeder crusher in the six flat right straight section MMV012. There were two places where the wires were cut in [two] and the wires were just twisted together and taped up."

The standard at 30 C.F.R. § 75.514 provides as follows: "All electrical connections or splices in conductors shall be mechanically and electrically efficient, and suitable connectors shall be used. All electrical connections or splices in insulated wires shall be reinsulated at least to the same degree of protection as the remainder of the wire."

There is no dispute that the wires were twisted together as charged and that no connectors were used. According to

Inspector Wehr, the cable was continually subject to being pulled apart and was located in a busy area. Wires could heat up in the case of a defective connection and because of the dampness of the area, miners could be expected to suffer electrical shock in the vicinity of the splice. Wehr pointed out that "stakon" connectors are regularly used at the cited mine and are considered to be "suitable" connectors.

While not disputing the factual testimony of Inspector Wehr, Assistant Mine Foreman Joseph Stout opined that the splice was nevertheless "nice looking". He testified, moreover, that all employees are told not to touch areas of the wire not properly insulated and that the wire here cited was hanging about 6 feet above the mine floor. I find that the testimony of Inspector Wehr is not rebutted in material respects and that indeed the hazard of electrical shock was reasonably likely under the circumstances. I accordingly find that the violation was serious and "significant and substantial". I also find that the operator was negligent in allowing splices to be made without connectors. The condition was abated in a timely manner when the wire was respliced with connectors.

Citation No. 1249710 charges a violation of the standard at 30 C.F.R. § 75.515 and specifically charges that "the power cable entering the metal frame to the junction box of the No. 122 sump pump located at 44 chute on B track Cherokee was not passing through a proper fitting". It was further alleged that the pump was then energized. The cited standard requires that: "cable shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings [and that] when insulated wires other than cables pass through metal frames, the hole shall be substantially bushed with insulated bushing."

The facts as alleged in the citation are not in dispute. According to Wehr, the cable entering the hole in the metal junction box had nothing to prevent its wires from being pulled from the box. While Wehr conceded that the insulation on the wire was intact where it passed through the box, he nevertheless observed that a sharp edge on the metal box could readily break the insulation, thereby creating a potential short circuit. Wehr pointed out that if the circuit breaker or pump fuse also failed, then a serious electrical shock hazard existed. I accept Inspector Wehr's assessment that electrical shock would be reasonably likely to occur under the circumstances. The hazard was therefore serious and "significant and substantial". Because the violation also existed in an area of high visibility, I also find the

operator negligent for failing to locate and correct it. The violation was corrected in a timely manner after it was cited.

Citation No. 1249711 also alleges a violation of the standard at 30 C.F.R. § 75.514, specifically charging as follows: "The No. 10 cable serving power to the No. 122 sump pump located at Chute 44 on 1 B 1 track haulage on Cherokee had been cut into and suitable connectors were not used to make connection of the severed wires. The wires were twisted together."

The cited allegations are not in dispute. Wehr observed that the outer insulation was taped over the wires that had been twisted together without a connector. The splice was therefore subject to being separated in a wet environment. The 550 volt direct current system would be sufficient to kill a person exposed to the shock hazard. Accordingly, I find that the violation was "significant and substantial" and a serious hazard. The failure of the operator to use suitable splice connectors under the circumstances shows a clear lack of supervision over its electrical work and this constitutes negligence. The record shows that the condition was abated in a timely manner after it was cited.

Citation No. 1249717 was withdrawn by the Secretary at hearing on the basis that the evidence admittedly did not support a violation of the cited standard. The undersigned agrees with the Secretary's assessment and approves of the withdrawal. The citation is accordingly vacated. Commission Rule 11, 29 C.F.R. § 2700.11.

Citation No. 1250082 also alleges a violation of the standard at 30 C.F.R. § 75.515 and specifically charges as follows: "The power cable entering metal frame to battery charger located in the No. 13 room between 10 to 11 crosscut in the eight flat five room section MMV011 was not passing through a proper fitting. The cable was rubbing the metal and the charger was energized at the time." According to Inspector Wehr, the clamp that had been in position had pulled out and slid down the cable. He observed that the cable had already been pulled out a few inches and that if the ground wire had pulled all the way out, there was a potential for shock. Wehr conceded that the insulation on the wires entering the charger was intact and that the circuit breaker would ordinarily cut power to the charging unit to prevent shock, however, if the breaker should fail, a miner coming in contact with the charging unit could suffer electrical shock and indeed could be electrocuted or

severely burned. The violation was therefore "significant and substantial" and serious. The condition of the wires was obvious and therefore should have been observed during the course of preshift examinations. The operator was accordingly negligent. The condition was abated in a timely fashion.

Citation No. 1249383 alleges a violation of the standard at 30 C.F.R. § 75.503 and more particularly by reference to 30 C.F.R. § 18.46(b). Section 18.46(b) requires that headlights "shall be protected from damage by guarding or location." The citation here specifically charges as follows: "The No. 39 shuttle car serial No. 1802 approval No. 2F1490A43 in six flat eleven room section was not maintained in permissible condition as the headlight opposite the operator was not securely fastened to frame of shuttle car."

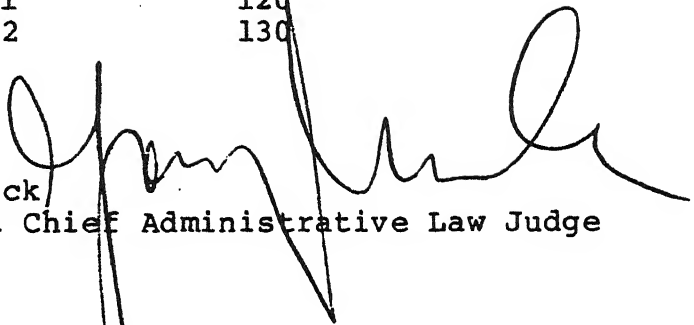
It is not disputed that the headlight was loose and only one bolt was holding it in position. Under the circumstances, I find that the light was not adequately protected from damage and the violation is proven as charged. According to MSHA Inspector Alvin Shade, there also existed the reasonable likelihood that the bouncing light might break or tear out its wiring, thereby causing an arc. If methane were present under the circumstances, there existed a hazard of an explosion. Although it is undisputed that at the time the violation was discovered, methane levels were within permissible nonexplosive limits, there is always the danger, according to Shade, of a sudden inundation of methane. According to Shade, there have been in the past explosive accumulations and ignitions of methane at the subject mine. Within this framework, I conclude that the violation was indeed "significant and substantial" and of high gravity. I further find that the headlight in the condition cited should have been discovered by the operator and that accordingly it was negligent in failing to discover and correct the condition. The violation was abated in a timely manner.

In assessing the violations noted below, I have also taken into consideration that the operator is large in size and that a significant history of violations exists.

ORDER

Citation No. 1249717 is vacated. U.S. Steel Mining Company, Inc., is ordered to pay the following penalties within 30 days of the date of this decision:

Citation No. 1249383	\$150
Citation No. 1145289	170
Citation No. 1249704	170
Citation No. 1249705	200
Citation No. 1249706	140
Citation No. 1249710	120
Citation No. 1249711	120
Citation No. 1250082	130



Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAR 23 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-132
Petitioner	:	A. C. No. 15-11450-03501
	:	
v.	:	Riverway North Dock
	:	
RIVERWAY NORTH, INC.,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Steffey

A prehearing order was issued on May 23, 1983, in the above-entitled proceeding requesting, among other things, that the parties advise me by June 20, 1983, whether a settlement of the issues had been achieved. Although return receipts in the official file show that both parties received the prehearing order 2 days after it was mailed, neither party submitted a reply to the prehearing order. Thereafter, an order to show cause was issued on August 2, 1983, pursuant to the provisions of 29 C.F.R. § 2700.63(a), requesting the parties to show cause, by August 30, 1983, why they should not be held in default for failure to reply to the prehearing order. Return receipts in the official file show that both parties received the show-cause order within 2 days after it was mailed but, again, neither party has responded to the show-cause order, although nearly 7 months have elapsed since replies to the show-cause order were due.

Since neither party replied to the show-cause order, each party could be held in default for its inaction. The show-cause order provided that if respondent were held in default, it would be ordered to pay the penalty of \$20 proposed by the Assessment Office, and that if the Secretary were held in default, the proposal for assessment of civil penalty would be dismissed for lack of prosecution. While respondent did not reply to the prehearing order or to the show-cause order, it did request a hearing with respect to the alleged violation of 30 C.F.R. § 71.802, and it also filed an answer in which it fully stated its position. Since the Secretary has the burden of proving that a violation occurred, I believe that the Secretary should be held to be primarily at fault for failure to reply to two different procedural orders and that the proper action for the Secretary's apparent indifference about the disposition of this case should be a dismissal of the action. Therefore, I find that the Secretary of Labor is in default for failure to reply to the prehearing and show-cause orders issued May 23, 1983, and August 2, 1983, respectively.

WHEREFORE, for the reason given above, it is ordered:

The proposal for assessment of civil penalty filed on March 21, 1983, in Docket No. KENT 83-132 is dismissed.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U. S. Department of Labor, Room 280, U. S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Riverway North, Inc., Attention: Mr. Worley Charles, Route 3, Box 21, Ashland, KY 41101 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAR 1 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-244
Petitioner	:	A. C. No. 15-11436-03502
	:	
v.	:	Fariston Tipple
	:	
KENTUCKY BLUE COAL COMPANY,	:	
INC.,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Steffey

The proposal for assessment of civil penalty filed in the above-entitled proceeding seeks to have a penalty assessed for a single violation of 30 C.F.R. § 48.28 alleged in Citation No. 2005380 dated November 3, 1982. The condition or practice stated in the citation is that "[t]he employees at this tipple have not received the required 8 hrs. annual refresher training." When respondent failed to file a reply to the proposal for assessment of civil penalty, a show cause order was issued on January 11, 1984, requiring respondent to explain within 30 days why it had failed to file an answer to the proposal for assessment of civil penalty. Respondent promptly filed an answer on January 16, 1984, stating that respondent has always received a waiver for shower facilities and that respondent has had the use of bathroom facilities through the kindness of one of respondent's employees who lives not more than 25 feet from respondent's property. There is nothing in respondent's answer to the show-cause order to explain what a waiver as to providing shower facilities or the use of a nearby bathroom has to do with the sole violation at issue in this proceeding, namely, respondent's alleged failure to provide 8 hours of annual refresher training.

Section 2700.28 of the Commission's rules, 29 C.F.R. § 2700.28, provides as follows:

A party against whom a penalty is sought shall file and serve an answer within 30 days after service of a copy of the proposal on the party. An answer shall include a short and plain statement of the reasons why each of the violations cited in the proposal is contested, including a statement as to whether a violation occurred and whether a hearing is requested.

As I have explained in the first paragraph of this order, respondent's answer filed on January 16, 1984, failed to comply with section 2700.28 of the Commission's rules. Therefore, a second order to show cause was issued on January 25, 1984. The last paragraph of that order provided as follows:

Respondent shall, by February 28, 1984, file an answer to the proposal for assessment of civil penalty in Docket No. KENT 83-244 specifically explaining why a hearing is desired with respect to the violation of section 48.28 alleged in Citation No. 2005380 issued November 3, 1982. Failure of respondent to reply to this second show-cause order will result in my concluding that respondent no longer wants a hearing with respect to the alleged violation of section 48.28. I shall thereafter find respondent to be in default and respondent will be ordered to pay the full penalty of \$20.00 proposed by MSHA.

The return receipt in the official file shows that respondent received the second show-cause order on January 26, 1984, but I have received no reply to that order. Consequently, I find respondent in default for failure to file an answer to the show-cause order issued January 25, 1984. Section 2700.63(b) of the Commission's rules provides:

(b) Penalty proceedings. When the Judge finds the respondent in default in a civil penalty proceeding, the Judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

WHEREFORE, it is ordered:

Respondent, having been found in default, is ordered to pay a civil penalty of \$20.00 within 30 days from the date of this order for the single violation of section 48.28 alleged in Citation No. 2005380 dated November 3, 1982.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U. S. Department of Labor, Room 280, U. S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Bill Wilder, Kentucky Blue Coal Company, Inc., P. O. Box 750, Corbin, KY 40701 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAR 23 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 81-498
Petitioner	:	A. C. No. 46-06158-03011 H
	:	
	:	Docket No. WEVA 81-508
v.	:	A. C. No. 46-06158-03007 V
	:	
	:	Docket No. WEVA 81-509
LITTLE-J COAL COMPANY, INC.,	:	A. C. No. 46-06158-03008
Respondent	:	
	:	Docket No. WEVA 81-510
	:	A. C. No. 46-06158-03009 V
	:	
	:	Docket No. WEVA 82-86
	:	A. C. No. 46-06158-03014
	:	
	:	No. 1 Mine

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor,
U. S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Philip A. LaCaria, Esq., Tutwiler, LaCaria &
Murensky, Welch, West Virginia, for Respondent.

Before: Judge Steffey

A hearing in the above-entitled consolidated proceeding was held on January 17, 1984, in Bluefield, West Virginia, pursuant to section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977. The parties presented evidence with respect to the petition for assessment of civil penalty filed by the Secretary of Labor in Docket No. WEVA 82-86. At the conclusion of the presentation of evidence, I rendered a bench decision assessing penalties for the nine violations alleged in that proceeding. Thereafter, the parties orally moved that I accept a motion for approval of settlement with respect to the remaining four cases. Under the parties' settlement agreement, respondent would pay penalties totaling \$2,790 instead of the penalties totaling \$8,370 proposed by the Assessment Office with respect to the remaining four cases. The substance of my bench decision is first set forth below followed by a discussion of the reasons for granting the parties' settlement agreement.

Docket No. WEVA 82-86

The issues in a civil penalty case are whether a violation of the Act or the mandatory health and safety standards occurred and, if so, what penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. The petition for assessment of civil penalty filed in Docket No. WEVA 82-86 seeks to have penalties assessed for nine violations of the mandatory health and safety standards based on nine violations alleged in Order and Citation No. 897273 issued January 19, 1981, pursuant to sections 107(a) and 104(a) of the Act. The citation portion of the order alleges five different violations of 30 C.F.R. § 75.900 which provides as follows:

Low- and medium-voltage power circuits serving three-phase alternating current equipment shall be protected by suitable circuit breakers of adequate interrupting capacity which are properly tested and maintained as prescribed by the Secretary. Such breakers shall be equipped with devices to provide protection against undervoltage, grounded phase, short circuit, and overcurrent.

The condition or practice given as the basis for each of the five violations of section 75.900 was identical, that is, the inspector stated that "* * * the grounded phase protective device for the 400 ampere circuit breaker" was inoperative with respect to five different types of equipment, namely, the cable to the belt feeder, the trailing cable to the coal-cutting machine, the trailing cables for the standard and off-standard shuttle cars, the cable for the belt conveyor, and the trailing cable for the coal drill.

Before penalties can be assessed, it is necessary to determine whether the alleged violations actually occurred. One of respondent's owners testified in this case and he agreed with the inspector that the protective devices in the power center were inoperative. In such circumstances, I think that there is no question but that the violations of section 75.900 occurred. The Act requires that penalties be assessed on the basis of the six criteria listed in section 110(i) of the Act.

I shall first consider two criteria of general applicability and my findings as to those two criteria will be applicable for determining all penalties in this proceeding. The first criterion pertains to the size of respondent's business. The operator first testified that he had two mines, each of which produced 400 tons of coal per day, but later he stated that the second mine became operative after 1981 when the violations alleged in this case occurred.

There was introduced as Exhibit 3 a cover page for the assessments proposed by MSHA in Docket No. WEVA 82-86, and that exhibit shows that the total company had a production of 79,042 tons on an annual basis in 1981. Those tonnage figures, together with the fact that the mine employed only 24 persons in 1981 on one maintenance and two production shifts, support a finding that a small company is involved in this proceeding and that, insofar as the criterion of the size of respondent's business is concerned, only small penalties should be assessed.

The second criterion to be considered is whether the payment of penalties would cause the operator to discontinue in business. There has been submitted as Exhibit A a copy of respondent's Federal income tax return for 1980 and that shows that respondent made a taxable income of a little over \$26,000 in 1980. There was submitted as Exhibit B a Federal income tax return for 1981 and that indicates that respondent lost \$22,748 in that year. The operator testified that respondent's financial condition became worse in 1982, and that at the present time, respondent is operating only one mine with a total of 10 employees. There are also some unaudited income and loss statements in Exhibit B, but I have found from past experience that it is not desirable to rely upon unaudited figures. Therefore, I am basing my findings solely on the Federal income tax returns and the operator's testimony which support a finding that respondent is not in good financial condition. I believe that the evidence supports a finding that assessment of large penalties would have an adverse effect on respondent's ability to continue in business.

The third criterion is respondent's history of previous violations. Normally, the Secretary's counsel introduces a printout from a computer showing how many previous violations there have been, but I did not receive such a printout in this case. Sometimes the official files have an indication of respondent's history of previous violations, but in this proceeding, there is nothing in the official files pertaining to respondent's history of previous violations. Since there is no evidence to support findings with respect to respondent's history of previous violations, that particular criterion cannot be evaluated in this proceeding.

The fourth criterion is the question of whether the operator demonstrated a good-faith effort to achieve rapid compliance once a violation was cited. In this instance, the operator did show a good-faith effort to achieve rapid compliance because all of the violations were corrected by the next morning and the inspector terminated the order at that time. Therefore, I find in this instance that respondent made a good-faith effort to achieve rapid compliance.

The two criteria which have the most to do with assessing large or small penalties in most cases are gravity and negligence. Since gravity or seriousness has been addressed more than any other criterion, it is the one to which primary attention should be directed. Counsel for the Secretary, in his summation, appropriately stressed that criterion because the order was issued under imminent-danger section 107(a) of the Act. Counsel for the Secretary discussed the meaning of imminent danger. Section 3(g) of the Act defines an imminent danger as " * * the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

The Commission has not written very many decisions with respect to the meaning of imminent danger. It did find that an imminent danger existed in Pittsburgh and Midway Coal Co., 2 FMSHRC 787 (1980). In that case, the Commission commented that it was not certain that the "probable as not" gloss added to the definition of imminent danger by the former Board of Mine Operations Appeals was necessary and that the Commission would amplify its understanding of the meaning of imminent danger in future decisions.

In several cases the Commission has, of course, pointed out that the validity of withdrawal orders is not an issue in civil penalty cases. In Pontiki Coal Corp., 1 FMSHRC 1476 (1979), the Commission stated that a judge should not vacate orders in civil penalty cases because the issues in civil penalty cases are whether violations occurred and what penalties should be assessed if it is found that they did occur. Consequently, it is not necessary in this proceeding to make a formal finding as to whether the inspector issued a valid or invalid order under section 107(a) of the Act. It is sufficient that I simply determine whether the alleged violations occurred and assess penalties if I find that they did.

The evidence shows that the violations of section 75.900 were serious because the witnesses agreed that if a fault occurred in the equipment which was being supplied with energy from the power center where the protective devices were inoperative, that energization of the frames of the shuttle cars and other equipment could occur, and that a serious shock or electrocution could follow if someone should touch the equipment in an energized condition. The only witness who said that mitigating circumstances existed was the operator who stated that the mine was dry throughout and that there was less danger of electrocution than if the mine had been wet. The inspector was not asked about the wetness or dryness of the mine. Therefore, I find on the basis of the operator's testimony, that there was at least the ameliorating factor that the mine was dry. Nevertheless, the preponderance of the evidence supports a finding that serious violations of section 75.900 occurred.

The sixth criterion is negligence. The record shows that the inspector went to the mine to make an inspection on the basis of a complaint from the union. That complaint is Exhibit No. 1 in this proceeding. The existence of the complaint is some indication that respondent's management should have been aware that some problems in the electrical system were occurring.

Respondent has introduced evidence, however, indicating that the individual who made the report to the union and requested that an inspection be made under section 103(g) of the Act was an individual who had a propensity for causing trouble for the mine owners. Respondent's witness said that at the time the inspection was requested, the person who requested the inspection was trying to get payment for some vacation and sick days and that he wanted to be paid in the first month of the year instead of being paid throughout the year at such times as the days are used for illness or other personal reasons.

The Secretary's counsel has emphasized that I should not consider the above-described type testimony because it is speculative. The Secretary's counsel contends that the violations did occur and that whether there was some sort of animosity on the part of one or more miners toward the operator on account of labor problems should not affect the outcome of this case in any way because the Act was properly working in this instance in that the miners did sense that something was wrong with the electrical system and did make a complaint to MSHA which was investigated with the result that the order here before me was issued. I agree with the Secretary's counsel that the aforesaid events did occur and that the inspector did make an appropriate inspection. In considering the criterion of the operator's negligence, however, I think that the above-described matters are relevant because the operator testified that someone had put paper in some of the protective devices to keep them from working. The inspector agreed that he found paper in at least one of them, although the inspector did not think the paper made the protective device inoperative. The operator has also testified that it is easy to loosen the doors on the protective devices so that they will not work properly. The operator's testimony shows that it would be a very simple matter for a disgruntled employee to sabotage the power center and then make a complaint just to bring about harassment of the operator.

The inspector himself indicated that he had not gone into a situation in which so many of these protective devices were out of order in a single power center, so there is circumstantial evidence to support the operator's claim that the violations of section 75.900 may have been brought about through no fault or knowledge of the operator. Moreover, the operator also testified without contradiction that he had not had any lost-time accidents in his mine and that he had had no other electrical

violations prior to this instance. In such circumstances, I find that the preponderance of the evidence shows that the violations of section 75.900 were associated with a low degree of negligence.

If a large operator in sound financial condition were involved, I might find that the gravity of the violations warrants a penalty of \$500 for each violation, but in view of the fact that respondent is a small operator in a very poor financial condition at this time, I believe that a penalty of \$50 for each of the violations is appropriate, or \$250 for all five violations of section 75.900.

The citation portion of Order No. 897273 also alleges a violation of section 75.601 in that the trailing cable disconnecting devices to the belt feeder, the roof-bolting machine, and the belt conveyor "* * * were not marked for identification". The inspector testified that he did not consider the violation of section 75.601 to be as serious a violation as the inoperative protective devices discussed above. The operator testified that he did have chains hooked to the cables so that they could not be plugged into the wrong circuit breakers, but he agreed that he did not have the required identification on them. He also thought that it might be remotely possible that a shuttle car other than the one desired might be energized in some unusual circumstances. Ordinary negligence was associated with the violation of section 75.601 because it is highly improbable that the miner who asked for the inspection would have gone around taking labels off of the various connecting devices if they had been on the devices in the first place. The facts discussed above support assessment of a penalty of \$25 for the violation of section 75.601.

The citation portion of Order No. 897273 also alleged occurrence of two violations of section 75.512 which requires that electrical equipment be maintained in a safe operating condition and also requires that a record of electrical examinations be kept. The first violation of section 75.512 was that the power center itself was not being maintained in a safe operating condition and the second violation of section 75.512 was that a record of weekly electrical examinations had not been made for a period of about 2 weeks.

The operator did not contest the fact that the violations of section 75.512 occurred. Therefore, I find that two violations of section 75.512 did occur. The inspector did not specifically discuss the violation of section 75.512 with respect to the failure to maintain the electrical center in a safe condition because the lack of safety as to the power center related entirely to the five violations of section 75.900 which have previously been discussed above. The same findings as to negligence and gravity made above with respect to the inoperative

protective devices are equally applicable to the failure of the power center to be maintained in a safe operating condition. Since I have, in effect, assessed a penalty for the failure to maintain the power center in a safe operating condition by assessing total penalties of \$250 for the inoperative protective devices, it is duplicative to assess a sixth penalty of \$50 for the same condition which brought about the \$50 penalties for the five inoperative protective devices. Consequently, I shall assess a penalty of \$20 for the failure of the power center to be maintained in a safe operating condition.

The second violation of section 75.512 with respect to the failure to record the weekly electrical examinations was associated with ordinary negligence and the inspector did not classify that violation as being particularly serious. Therefore, I shall assess a penalty of \$20 for the second violation of section 75.512.

The final violation alleged in the citation portion of Order No. 897273 was a violation of section 75.515 which requires that cables enter metal frames through proper fittings. In this instance, there was no testimony controverting the inspector's allegation that the cable entering the metallic disconnecting device for the roof-bolting machine was not provided with a proper fitting. I find that the violation occurred, that it was associated with ordinary negligence, and that it was relatively nonserious because there was no testimony showing that the cable was worn in any way so as to constitute an immediate electrical hazard at the time the violation was cited. Therefore, a penalty of \$20 will be assessed for the violation of section 75.515.

The total penalties assessed above amount to \$335 for the nine violations alleged in Citation and Order No. 897273. It should be noted that my bench decision, at transcript page 82, refers to a total amount of \$320. That page of the bench decision inadvertently failed to assess a specific penalty for the violation of section 75.515. Therefore, the bench decision has been corrected above to include assessment of a penalty of \$20 for the violation of section 75.515.

Consideration of the Parties' Settlement Agreement

As previously indicated, the parties moved at the hearing that I accept a settlement under which respondent agreed to pay penalties totaling \$2,790 instead of the penalties totaling \$8,370 which had been proposed by the Assessment Office for the remaining four cases in this proceeding as to which no evidence was presented by either party. The primary reason given at the hearing for the settlement agreement is based on the evidence discussed above to the effect that respondent is in poor financial condition and presently is barely continuing to operate with production from a small mine which employs only 10 persons.

I believe that the two criteria of the size of respondent's business and the fact that payment of large penalties would adversely affect respondent's ability to continue in business warrant acceptance of the settlement agreement. It is my practice, however, to allocate specific penalties to each of the alleged violations. Therefore, I shall briefly discuss the violations alleged in each docket for the purpose of allocating specific penalties.

Docket No. WEVA 81-498

The petition for assessment of civil penalty in Docket No. WEVA 81-498 is based on Order No. 886972 issued on February 2, 1981, pursuant to section 107(a) of the Act. Although the order states that the roof-control plan was not being followed because the roof-bolting machine operator and his helper were observed working inby permanent supports, the order appears to be somewhat defective in failing to state specifically that a violation of the roof-control plan is a violation of section 75.200. Additionally, although the order purports to cite a violation, the order does not show that the violation is being cited under section 104(a) of the Act. While it is possible that the order was modified by the inspector at a subsequent time to show that the citation was issued under section 104(a) and that a violation of section 75.200 was intended to be cited, the official file contains no copy of such modification. Moreover, the order claims that all working places are closed as a part of the order, yet the only hazard cited in the order is that the roof-bolting machine operator and his helper were working beyond permanent roof supports in a crosscut to the left of the No. 4 entry.

The official file contains neither narrative findings by the Assessment Office nor a proposed assessment sheet to show how the Assessment Office arrived at a proposed penalty of \$2,000 for the alleged violation of section 75.200. In view of the many infirmities in the order as it appears in the official file, I believe that a penalty of \$200 is all that should be allocated to the violation of section 75.200 alleged in Order No. 886972.

Docket No. WEVA 81-508

The petition for assessment of civil penalty filed in Docket No. WEVA 81-508 seeks assessment of penalties for six alleged violations. The six violations are alleged in one citation and five orders written under the unwarrantable-failure provisions of section 104(d)(1) of the Act. The citation and two of the orders allege violations of section 75.400 because of the existence of loose coal and float coal dust accumulations in three different areas of the mine. The citation (No. 896226) avers that the accumulations existed along the belt conveyor and were from 1 inch to 14 inches in depth. The citation notes that the preshift reports had indicated that the belt entry needed

cleaning and rock dusting and that the mine superintendent had done some work toward cleaning up the accumulations and had, in fact, reported the condition as corrected. Since the citation itself shows that a difference of opinion existed between the superintendent and the inspector as to whether the accumulations had been cleaned up, it is likely that the operator would have contested the inspector's allegations if a hearing had been held.

The official file does not contain narrative statements or a proposed assessment sheet to show how the Assessment Office derived its proposed penalty of \$800, but the penalty proposed for this alleged violation of section 75.400 is less than was proposed for the other two violations of section 75.400. Therefore, I believe that the Assessment Office took into consideration the fact that the operator had made an effort to clean up the accumulations before they were cited by the inspector. In the absence of any information to support a different evaluation, I believe the proposed penalty for the first alleged violation of section 75.400 should be reduced to \$200 because the equivocal nature of the allegations made in the citation make it difficult to find that the violation was associated with the high degree of negligence which should accompany a violation cited under the unwarrantable-failure provisions of the Act.

The next two alleged violations of section 75.400 are based on accumulations in all seven entries inby the loading point where the depths are said to have ranged from 1 to 14 inches. The other accumulations were said to exist in the intake entries in depths of from 1/4 to 6 inches. The Assessment Office proposed penalties of \$1,200 for each of the violations. The primary basis for the finding of unwarrantability seems to be that the accumulations had not been reported by the preshift or on-shift examiners. Bearing in mind that in settlement cases, I must accept allegations in orders and citations as I find them, without consideration of any defenses which respondent may have, it appears that there is a basis for the inspector's belief that a high degree of negligence existed in the fact that accumulations were found in practically all areas of the mine on January 20, 1981, the day when the citation and orders were written. I believe that the accumulations cited in the face area appear to be more hazardous than the ones cited in the intake entries. Therefore, I am allocating a penalty of \$590 for the violation involving accumulations inby the dumping point and \$500 for the accumulations in the intake entries.

Both violations of the roof-control plan cited in Order Nos. 896233 and 896234 consisted of an alleged failure to set a minimum of four temporary supports immediately after the loading cycle was completed. The inspector's orders do not say that roof conditions were unstable, but the Assessment Office proposed a penalty of \$1,000 for each violation of section 75.200. Most

of the proposed penalty, therefore, must be associated with the inspector's having written the orders under the unwarrantable failure provisions of section 104(d) of the Act. Since there is no indication that anyone had gone under the unsupported roof, I believe that each of the proposed penalties of \$1,000 should be reduced to \$300.

Order No. 896237 alleges the final violation to be considered in Docket No. WEVA 81-508. That order states that respondent violated section 75.303 by failing to make an adequate pre-shift examination. The inspector's belief that the pre-shift examination was inadequate is based on the fact that the conditions cited in the orders previously discussed were not reported by the pre-shift examiner. It is a fact, however, that the first unwarrantable-failure violation cited by the inspector on January 20, 1981, refers to the fact that the loose coal accumulations in the belt entry had been reported for several shifts and to the fact that the mine superintendent had had some work done on cleaning up the loose coal accumulations. Therefore, if a hearing had been held, it is likely that a difference of opinion would have developed as to the inspector's claim that an adequate pre-shift examination had not been made. The Assessment Office proposed a penalty of \$500 for the alleged violation of section 75.303. In view of the speculative nature of the alleged violation, I believe that a penalty of no more than \$100 is warranted.

Docket No. WEVA 81-509

The petition for assessment of civil penalty filed in Docket No. WEVA 81-509 seeks assessment of a single penalty for a violation of section 75.200 based on Order No. 896232 issued January 20, 1981. The violation alleged is that miners were working inby permanent roof supports and the violation is based on the inspector's belief that the miners were using equipment whose controls were so close to the unsupported roof that the operator of the equipment would necessarily have had to have worked under unsupported roof. Here again, the inspector cited the violation of section 75.200 in an imminent-danger order written pursuant to section 107(a) of the Act without showing that the violation was being cited pursuant to section 104(a) of the Act. The inspector may have modified the order to state that the citation was made under section 104(a) of the Act, but no modification was submitted in support of the petition for assessment of civil penalty. There is no proposed assessment sheet in the official file, but despite the fact that the violation was cited in an imminent-danger order, the Assessment Office proposed a penalty of only \$170. The infirmities in the order indicate that allocation of a penalty of \$100 is adequate for the violation of section 75.200 alleged in Order No. 896232.

Docket No. WEVA 81-510

The petition for assessment of civil penalty filed in Docket No. WEVA 81-510 seeks assessment of a civil penalty for a single violation of section 75.200 alleged in Order No. 896878 issued February 2, 1981, under unwarrantable-failure section 104(d)(2) of the Act. The violation alleged involves the same circumstances as the violation discussed under Docket No. WEVA 81-508 above, that is, failure of the operator to set a minimum of four temporary supports immediately after the loading cycle was completed. In this instance, the inspector's order notes that the condition was reported by the preshift examiner, but the inspector believes that a high degree of negligence existed because five violations of section 75.200 had been cited since January 20, 1981, the date on which the other violations of section 75.200 were cited, as previously described under Docket No. WEVA 81-508, supra.

It appears that the inspector has given sound reasons in this instance for believing that the violation was associated with a high degree of negligence. The inspector does not claim that the roof conditions were particularly hazardous, but consistent failure to set temporary supports is a very bad practice which should be deterred and civil penalties were provided in the Act for that purpose. Therefore, I find that the Assessment Office's proposed penalty of \$500 should be allowed in its entirety in this case.

It should be borne in mind that all of the reductions of the penalties proposed by the Assessment Office have been greatly influenced by the fact that a small operator is involved and by the fact that I have found above that payment of penalties would have an adverse effect on respondent's ability to continue in business. For all of the reasons hereinbefore given, the parties' settlement agreement should be approved.

WHEREFORE, it is ordered:

(A) Respondent, within 30 days from the date of this decision, shall pay civil penalties totaling \$335 with respect to the nine violations alleged in Docket No. WEVA 82-86. The penalties are allocated to the respective violations as follows:

Citation and Order No. 897273	1/19/81	\$ 75.512	..	\$ 20.00
Citation and Order No. 897273	1/19/81	\$ 75.900	..	50.00
Citation and Order No. 897273	1/19/81	\$ 75.900	..	50.00
Citation and Order No. 897273	1/19/81	\$ 75.900	..	50.00
Citation and Order No. 897273	1/19/81	\$ 75.900	..	50.00
Citation and Order No. 897273	1/19/81	\$ 75.900	..	50.00
Citation and Order No. 897273	1/19/81	\$ 75.601	..	25.00
Citation and Order No. 897273	1/19/81	\$ 75.512	..	20.00
Citation and Order No. 897273	1/19/81	\$ 75.515	..	<u>20.00</u>

Total Penalties Assessed in Docket No.

WEVA 82-86 \$335.00

(B) The parties' motion for approval of settlement is granted and the settlement agreement is approved.

(C) Pursuant to the parties' settlement agreement, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling \$2,790.00 which are allocated to the respective alleged violations as follows:

Docket No. WEVA 81-498

Citation and Order No. 886972 2/2/81
\$ 75.200 \$ 200.00

Total Settlement Penalties in Docket No.
WEVA 81-498 \$ 200.00

Docket No. WEVA 81-508

Citation No. 896226 1/20/81 \$ 75.400 \$ 200.00
Order No. 896233 1/20/81 \$ 75.200 300.00
Order No. 896234 1/20/81 \$ 75.200 300.00
Order No. 896235 1/20/81 \$ 75.400 590.00
Order No. 896236 1/20/81 \$ 75.400 500.00
Order No. 896237 1/20/81 \$ 75.303 100.00

Total Settlement Penalties in Docket No.
WEVA 81-508 \$1,990.00

Docket No. WEVA 81-509

Citation and Order No. 896232 1/20/81
\$ 75.200 \$ 100.00

Total Settlement Penalties in Docket No.
WEVA 81-509 \$ 100.00

Docket No. WEVA 81-510

Order No. 896878 2/2/81 \$ 75.200 \$ 500.00

Total Settlement Penalties in Docket No.
WEVA 81-510 \$ 500.00

Total Settlement Penalties in This
Proceeding \$2,790.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 23, 1984

KITT ENERGY CORPORATION,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 84-60-R
	:	
SECRETARY OF LABOR,	:	Citation No. 2263047; 11/2/83
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Kitt No. 1 Mine
Respondent	:	

DECISION

Appearances: Bronius K. Taoras, Esq., for Kitt Energy Corporation, Contestant;
Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Merlin.

This case is a Notice of Contest filed on December 1, 1983, by Kitt Energy Corporation under Section 105(d) of the Act, 30 U.S.C. 815(d) to review a citation dated November 2, 1983, issued by an inspector of the Mine Safety and Health Administration (hereinafter referred to as "MSHA") under Section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1). By Notice of Hearing dated December 22, 1983, this case was set for hearing on February 8, 1984. The hearing was held as scheduled.

At the hearing, the parties agreed to the following stipulations:

- (1) The applicant is the owner and operator of the subject mine.
- (2) The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
- (3) The Administrative Law Judge has jurisdiction of this case pursuant to Section 105 of the 1977 Act.
- (4) The inspector who issued the subject citation was a duly authorized representative of the Secretary of Labor.

- (5) True and correct copies of the subject citation and termination were properly served upon the operator in accordance with the 1977 Act.
- (6) Copies of the subject citation and termination are authentic and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevance of any statement asserted therein. The probative weight to which the citation is subject will be determined in light of all the evidence of record.
- (7) Inspector Tulanowski conducted an inspection of the Kitt Number 1 on November 2, 1983. The inspection that day began at approximately 11:45 p.m. on November 1, and continued into the early morning of November 3, 1983.
- (8) In the course of his inspection, Mr. Tulanowski discovered four areas as described in the subject citation along the D-11 belt where float coal dust was present in the belt entry.
- (9) The float coal dust was present only on the floor, and not on the roof or ribs or on the equipment in the entry.
- (10) The float coal dust described in the citation constituted a violation of 30 C.F.R. 75.400.
- (11) The subject mine is classified as a gassy mine, liberating two million 400,000 cubic feet of methane per 24 hours.

Section 304(a) of the Act, 30 U.S.C. 814(a), which also appears in 30 C.F.R. 75.400, provides as follows:

Coal dust, including float coal dust deposited on rock dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

The subject citation No. 2263047, describes the violative condition or practice as follows:

Beginning on the left side of the D-11 coal conveyor belt, between No. 1 and No. 2 block (approximately 50 feet) from No. 3 block to No. 4 block, (approximately 60 feet) from No. 8 + 80 block to No. 11 + 50

block on both sides of the conveyor belt (approximately 300 feet) and from No. 13 + 50 block to No. 26 block, (approximately 1,000 feet) there was float coal dust (black in color) deposited on the rock-dusted surface of the mine floor. Rock-dust was not available on the D-11 section to dilute the float coal dust at the time the citation was issued.

This condition was recorded in the preshift mine examiner's report since the 10-17-83, John Helms, mine foreman and his assistants has [sic] countersigned the preshift mine examiner's report since the 10-17-83.

One 107(a) order and 3 citations has [sic] been issued on float coal dust on belt conveyors at this mine since 10-28-83.

At the hearing the inspector described the violative areas the same way he had in the citation. He testified that walking inby along the belt entry, he cited four areas. The first area was fifty feet long with black float dust on the tight side of the entry but well rock-dusted on the clearance side (Tr. 26-30) (D-E on Jt. Exh. No. 1). The second was 60 feet long with float dust again on the tight side (Tr. 30-31) (F-G on Jt. Exh. No. 1). The third was 300 feet long with black float coal dust present on both sides and underneath the conveyor belt (Tr. 31-32) (H-J on Jt. Exh. No. 1). There were footprints on the clearance side where people had walked and it was white underneath (Tr. 34). The final area cited was one thousand feet long with float coal dust on both sides and underneath the belt (Tr. 35-37) (K-L on Jt. Exh. No. 1). Footprints again were visible on the wide side (Tr. 37). The operator's mine examiner who had accompanied the inspector specifically stated that he did not disagree with the inspector's description of the areas with float coal dust (Tr. 195). I accept the descriptions given by the inspector in the citation and testimony.

As set forth in Stipulation No. 10, it is agreed that a violation existed. The issues presented are therefore, whether the violation was significant and substantial and whether it resulted from an unwarrantable failure on the part of the operator.

In National Gypsum Company, 3 FMSHRC 822 (April 1981), the Commission first considered what would constitute a violation which "could significantly and substantially contribute to the cause and effect of a coal or other mine

safety or health hazard." The Commission held that a violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there existed a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. 3 FMSHRC at 825. In addition, the Commission expressed its understanding that the word "hazard" denoted a measure of danger to safety or health and that a violation significantly and substantially contributed to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. 3 FMSHRC at 827.

More recently, in Mathies Coal Company, FMSHRC Docket No. PENN 82-3-R etc., Slip Op. (January 6, 1984), the Commission stated:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. As a practical matter, the last two elements will often be combined in a single showing.

See also Consolidation Coal Company, FMSHRC Docket No. WEVA 80-116-R etc., Slip Op. (January 13, 1984), and Consolidation Coal Company, FMSHRC Docket No. PENN 82-203-R etc., Slip Op. (February 21, 1984).

The record demonstrates that the admitted violation presented a discrete safety hazard, that of explosion and fire. I accept the inspector's testimony that float coal dust is light, easily put into suspension, and has a high burning rate (Tr. 77). According to the inspector, a rock falling on and smashing a power cable could provide the spark which would ignite the float coal dust and cause an explosion (Tr. 77-78). In addition, the running of the belt itself could start a fire if there were a stuck or frozen roller creating heat to ignite the float coal dust which is easily combustible (Tr. 80-82, 126-127). The operator's shift foreman also stated that belt rollers running in float coal dust could ignite if they got hot enough and he agreed that float coal dust would intensify and magnify the danger from ignition or heat in a conveyor belt entry (Tr. 247-

248). The Commission has recognized the explosive character of float coal dust. Old Ben Coal Company, 1 FMSHRC 1954, 1956 - 1957 (1979).

I further find there was a reasonable likelihood that the hazard of fire or explosion would result in an injury. As set forth above, the inspector testified that an ignition could result if a falling rock broke a cable, thereby creating a spark to ignite the float coal dust. The record shows that the roof was very bad in this area (Tr. 129, 207). The inspector stated that although the area was adequately posted, rocks could fall in between the posts (Tr. 129). He believed it would not be unlikely for a large rock to fall (Tr. 129). The operator's shift foreman also described the roof as really bad and fractured, saying that it fell as it was cut and that the unit could advance only ten feet at a time (Tr. 251-252). At one point, the foreman stated that it was very unlikely a rock would rupture a cable but he agreed that it depended on how the rock fell (Tr. 219-221). The foreman knew of instances in the belt entry of this mine where rocks had fallen on power cables (Tr. 218). In addition, with respect to the belt power cable which ran to the center of the entry at one hundred foot intervals, he agreed there was certainly a likelihood the cable would be ruptured or cause an arc or spark from a falling rock (Tr. 249). The operator's mine examiner expressed the view that the chances of a rock hitting a cable were not reasonably likely but he also stated it depended upon the size of the rock (Tr. 193). He admitted the roof was scaling and chipping because it was winter (Tr. 200J-200K). After reviewing all the evidence, I conclude that because of the very bad nature of the roof, the weight of the evidence indicates that there was a reasonable likelihood of a fire or an explosion due to an arc from a ruptured cable igniting the float coal dust.

The record provides an additional basis for demonstrating the reasonable likelihood that the hazard involved would result in an injury. As set forth above, the belt itself could be an ignition source. The inspector testified that although the belt was not actually running, the belt starter box was energized, preparations were being made to run coal, and then the belt would be started (Tr. 72-73, 79-80). The inspector's testimony that this was a production shift is persuasive. The operator's witnesses appeared somewhat evasive on the point, either saying it might have been a production shift or they were not sure (Tr. 200J, 237). I accept the inspector's opinion that friction or heat from a belt in motion is a fairly common occurrence as a cause of ignition and I therefore credit his view that some type of ignition from the float coal dust he saw under the belt was likely. It is not necessary that the belt be in motion because as the inspector stated, this might be considered an

imminent danger. I reject the shift foreman's opinion that there was no reasonable likelihood of belt rollers causing an ignition of float coal dust because his opinion was based only upon the fact that he did not receive any information of rollers actually running in spillage or float dust (Tr. 226-227). The foreman did not see the condition.

Finally, I conclude that there was a reasonable likelihood that the injury which would result would be of a reasonably serious nature. The inspector explained that the belt entry was an escapeway, belt air was vented directly to the return, and a fire in the belt entry could contaminate all the entries with smoke (Tr. 82-83, 132-133). There was a danger of injury or illness from smoke inhalation (Tr. 84-86). Moreover, if escapeway entries were filled with smoke, there was a hazard from falling or tripping due to lack of visibility (Tr. 86-87).

In light of the foregoing, I decide that this violation was significant and substantial in accordance with the tests adopted by the Commission.

There remains for consideration the issue of unwarrantable failure. The inspector testified that before he went underground, he looked at the pre-shift and on-shift book for the period October 27 to November 13 (Tr. 15-17, 43-47). A photocopy of this book was accepted into the record as Joint Exhibit No. 2. The inspector testified that he looked at the on-shift report for the afternoon of November 1 which stated that the belt need to be cleaned and dusted and for "Action Taken" listed only "Reported" (Tr. 65). The inspector did not remember how far back he went into the book before he went underground (Tr. 15-17). However when he came above ground, he went through the entire book (Tr. 96). As the inspector testified, from the beginning of the book starting with the 6:15 A.M. pre-shift on October 27, there are repeated reports that the belt needed cleaning and dusting (Tr. 58-65). The inspector looked at the prior book and found such reports beginning on October 17 (Tr. 67). The books indicated that no action was taken until the 6:30 A.M. pre-shift for November 1 and the 10:00 A.M. on-shift on November 1 reports listed "Work in Progress" under "Action Taken" (Tr. 64). Until then, the only action taken was listed as "none" or "reported" (Tr. 58-65). It appears therefore that for two weeks beginning on October 17, the operator did nothing to correct this condition. On October 31, the union conducted its quarterly inspection and Item No. 17 of its report dated October 31, 1981, reported "The entire D-11 belt conveyor line needs the spillage removed underneath of several (12) rollers, float dust removed from the tight side, clearance side and underneath of the beltline" (Tr. 55). As a result of the union's report, the operator began to clean up the spillage (Tr.

161). However, as the inspector's uncontradicted description demonstrates, the belt still needed to be cleaned and dusted in extensive areas.

The inspector testified that he relied upon the pre-shift and on-shift books in finding unwarrantable failure (Tr. 106). After returning above ground, he also examined the pre-shift and on-shift book for the period October 8 through October 26 (Tr. 65-67). Based upon them, he concluded that for a period of two weeks, the operator knew or should have known of the violative condition cited by the inspector. This was more than enough time to completely correct the violation.

The operator's safety supervisor and section foreman testified that the books were inaccurate because work was done to clean up the belt on October 31 and on the afternoon shift of November 1 (Tr. 279-281). Even if this testimony is accepted as correct, it cannot change the result. First, the operator has the responsibility to make sure its pre-shift and on-shift books are correct and if they are not, the operator must bear the consequences. That the operator recognizes this is demonstrated by the testimony of its safety supervisor to the effect that after the issuance of this citation, it improved its books because they were what the inspector had to rely upon (Tr. 280). Secondly, the operator's witnesses indicated that after the union's quarterly inspection, men were assigned to clean up the belt for a few more shifts than the books show. However, there is no dispute that the cited condition had existed since October 17, nor is there any dispute as to what the inspector saw or his description of it. The operator's witnesses said only that the men had cleaned up the spillage and had done some cleaning and rock dusting (Tr. 294-296). This does not detract from the inspector's actions because he made it clear that he saw no spillage (Tr. 112-113). What is crucial is that although some float coal dust may have been taken care of, it remained present for a long time over very extensive areas of the belt entry. It is this essential circumstance relied upon by the inspector which is not contradicted by anything offered by the operator. Similarly, the operator's evidence confirms that although some rock dust had been used on the section, it was not enough to do the job and there was no rock dust available on the section when the inspector issued the citation (Tr. 187-189). The existence of unwarrantable failure was confirmed by the inspector and the operator's witnesses who explained how easy it would have been to bring adequate rock dust onto the section (Tr. 122-123, 190-191). Finally, the operator's

shift foreman explained that he took two men from the six man crew of the idle 2A section and that the remaining four men were setting up a longwall (Tr. 255). The shift foreman could have quickly cleaned up all the cited float coal dust if he had taken additional men from the 2A section. So too, he could have used additional men from the D-11 section itself, instead of having them continue to advance that section. Accordingly, I conclude that the operator's evidence not only fails to cast any doubt upon the inspector's finding of unwarrantable failure, but rather lends it further support.

The parties were ordered to file post hearing briefs. On March 19, 1984, the Solicitor filed his brief, which was most helpful. Counsel for the operator requested an extension until March 20, 1984, which was granted, but has filed no brief.

In light of the foregoing, Citation No. 2263047 is Affirmed.

The Notice of Contest is Dismissed.

A handwritten signature in black ink, reading "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAR 27 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 81-236-M
Petitioner : A.C. No. 02-00024-05013 H
v. :
: Morenci Mine Mill &
PHELPS DODGE CORPORATION, : Trailing Dam or Disposal
Respondent :
and
UNITED STEELWORKERS UNION, :
Authorized Miner :
Representative :

DECISION

Appearances: Linda Bytof, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco,
California,
for Petitioner;
James Speer, Esq., and Stephen Pogson, Esq.,
Evans, Kitchel & Jencks, Phoenix, Arizona,
for Respondent;
Angel Rodriguez, President, Morenci Miners
Union, Local 616, United Steelworkers,
Clifton, Arizona,
for the Authorized Miner Representative.

Before: Judge Morris

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act") arose from a January 8, 1981 inspection of respondent's Link Belt crane. The Secretary of Labor seeks to impose two civil penalties because respondent used the allegedly defective crane. It is asserted that such use violated the mandatory standard published at 30 C.F.R. § 55.9-2 which provides:

Equipment defects affecting safety shall be
corrected before the equipment is used.

Respondent denies that a violation occurred.

The parties offered extensive evidence on the issues. The hearing commenced on March 25, 1982, was adjourned, and later concluded on December 8, 1982 in Phoenix, Arizona.

The Secretary and the respondent submitted post trial briefs. The Union did not file a brief but it concurs in the position urged by the Secretary.

Issues

The issues are whether respondent violated the mandatory standard cited above. The thrust of the case focuses on the condition of the crane boom and the auxiliary transmission.

In the event a violation occurred then a secondary issue is presented as to what civil penalty should be assessed.

Stipulation

At the commencement of the hearing the parties stipulated as follows: respondent is the owner and operator of the Morenci mine, mill and tailings dam; respondent is subject to the Act; the administrative law judge has jurisdiction of this case; authentic copies of the citation were properly served on the operator; respondent is a large operator. The Morenci mine employs approximately 904 employees on three eight-hour shifts seven days per week; in the two year period prior to 1980 the mine had 52 assessed violations of which 50 were paid; imposition of a penalty will not affect the operator's ability to stay in business (Tr. 4-5).

Summary of the evidence

MSHA's evidence: On January 8, 1981 Eugene Pesqueira and Ron Barre, both MSHA inspectors, conducted a complaint inspection of respondent's Link Belt crane No. 2, (hereafter "MC2"). The complaint was that the crane had a faulty transmission as well as a defective boom (Tr. 11, 12, 40, 41, 45). Upon arriving at the worksite the inspector met company officials and miner representatives. They then proceeded to Silver Basin where MC2 was located. The crane was not then operating. (Tr. 12, 13, 34).

The 90 foot boom on MC2, a 45 ton crane^{1/}, consists of four different sections. The inspector observed that 13 lattices of the boom had been painted with an orange fluorescent paint. Laney, the crane operator, said the defective lattices had been

^{1/} The 45 ton designation refers to lift capacity. It means the crane has a capacity to lift 45 tons if the boom is at its minimum length, and it is on level ground with the outriggers set (Tr. 15, 107).

painted at his supervisor's direction (Tr. 13-15). The inspector showed Laney six other faulty lattices that hadn't been painted (Tr. 14). The lattices were bent, bowed, and improperly welded. One was missing (Tr. 14, 19).

While inspecting the boom the inspectors learned from the operator and driver (Laney and Cisneros) that the auxiliary transmission had a tendency to slip when in 2nd gear. The crane would then become free wheeling. (Tr. 28, 36, 37, 80). The hazard is that the crane could roll either direction when picking up weight (Tr. 28-29). After viewing the crane the inspector told the crane operator to discontinue using it and drive it to the shop (Tr. 29, 20).

There were seven B.O. (bad order) lattices in the top section of the crane boom, six in the two center sections, and four in one of the center pieces closest to the butt (Tr. 17-26, Exhibits P1-P12). One of the lattices had two welds on it. The defect of this sleeve was that an odd piece of pipe was serving as a lattice (Tr. 21, 22, P8). One lattice was missing (Tr. 23, Exhibit P10). The bowing and denting of the lattices is caused by mistreatment. Lattices have a tendency to bow if the crane picks up excessive weight (Tr. 26).

In the inspector's opinion a bad hazard exists if there are over two bowed lattices in any section of a boom. A missing, or bowed, lattice can weaken a boom and cause it to collapse. A boom will collapse at its weakest point (Tr. 26-28).

In checking on the safety of the crane MSHA contacted Duke Brown of Marco Crane and Rigging Company of Tucson, Arizona. Brown advised MSHA that the boom is unsafe if there are two or more lattices that should be replaced (Tr. 50, 51, 54). In addition, according to Brown, reinforcing a lattice by welding it with a pipe is not permissible (Tr. 54).

William D. Laney has operated various cranes since 1961. The rated capacities of such cranes have been 25, 35, 45, 82 and 140 ton vehicles (Tr. 56). Laney operated MC2 and others in 1980 and 1981. Respondent had obtained MC2 from the Sterns Rogers Company (Tr. 62-64). Laney had received and reviewed a copy of the operator's manual for MC2. (Tr. 65, 66). The maximum lifting capacity is contained in the manual. Incline, lifting capacity and side pull affect the lifting capacity of a crane (Tr. 66-69).

Damaged lattices reduce the strength in a boom column (Tr. 69, 70). Damaged lattices could cause the boom to collapse (Tr. 70).

Before the MSHA inspection Laney had been instructed by Baughman, his supervisor, to lower the boom to a horizontal position and paint anything he thought was defective and in need of repairs (Tr. 65, 71, 72). Laney had previously marked some safety defects on his pink card (vehicle inspection report). Further, he had expressed some concern over the safety of MC2 to his supervisors or at safety meetings (Tr. 73-75). He had been told that it was not necessary to repeat his complaints (Tr. 75).

On the day of the inspection Laney was operating MC2 at the tailings dam. He was preparing to lay Driscoll pipe (Tr. 75, 76). Between December 1980 and the January 8th inspection Laney had been primarily involved in the Driscoll pipe project (Tr. 76). The day before the inspection they had been working on the decant tank in the same general area (Tr. 77).

Driscoll pipe is small and fairly heavy. It measures 36 inches by approximately 31 feet (Tr. 76, 77). The total weight of the pipe being lifted can vary because of the residual tailings ^{2/} in the pipe (Tr. 77-79).

Laney discussed using the crane with supervisor Baughman. A combination of heavy pipes and muddy conditions at the worksite caused Laney to think the whole job was unsafe (Tr. 87).

After the lattices had been spray painted and inspected by company supervisors Laney received and posted a notice from the company (Exhibit R1) stating that the capacity of the crane was being reduced by one third (Tr. 100, 101).

On the day of the inspection Laney and Cisneros discussed the auxiliary transmission problems with the MSHA inspector. The problem would arise when the crane was backing down a steep ramp in reverse gear. It would then lunge down the hill as if the auxiliary transmission had disengaged (Tr. 80, 84). Instead of moving at a crawl the crane would suddenly be airborne and free wheeling (Tr. 80-83). The auxiliary transmission had jumped out of gear the day before the inspection (Tr. 37, 81, 82). The ramp at the worksite is 200 to 300 feet long; it is also quite steep (Tr. 81, 82). In order to drive the crane it is necessary to engage the four speed main transmission as well as the three speed auxiliary transmission (Tr. 82, 83). Laney believed the transmission jumped out of gear when the main transmission was in reverse (Tr. 83). This sporadic problem existed for a year or

^{2/} Tailings: the residual remaining after copper has been reclaimed from the basic ore (Tr. 77-78).

two (Tr. 23, 90). If the auxiliary transmission disengages when carrying pipe two or three pipe fitters could be "wiped out" (Tr. 84). The transmission had been repaired and replaced eight to nine months before the instant inspection. After the repair the problem was intermittent but it got progressively worse (Tr. 90).

Laney reported this condition and the boom condition on his pink card more than once. The company's pink card system had been in effect six or seven months before the inspection. An equipment operator usually fills out a card each day before operating his machine. Occasionally he will fill it out after operating it (Tr. 90-93, 95, 96, 227). In any event the equipment operator should fill out one card each day (Tr. 95, 96). Exhibit R2, a pink card, was filled out by Laney; Exhibit R3 was filled out after Laney talked to the MSHA inspector (Tr. 104, 222).

After the MSHA inspection the transmission was repaired in the company shop. After the repairs, in order to secure MSHA's clearance, Laney road tested MC2 for a distance of about 600 feet. It didn't jump out of gear in these tests (Tr. 228-233, Exhibit R4).

Harold Moody, the district service manager for FMC Corporation, testified at length concerning the Link Belt crane (Tr. 117-173). The FMC operator's manual states that any bent, damaged, or missing lattices should be repaired prior to use. Such a defective condition causes the column effect of the boom to be drastically reduced (Tr. 127). This reduces and can destroy the load capacity of the boom (Tr. 127, 136-137). FMC furnishes and recommends that an operator use an FMC replacement lattice (Tr. 128, 134, Exhibits P1, P14, P15, P16, P17).

The length of the boom, its radius, and its angle determine the boom's maximum capacity under ideal circumstances (Tr. 130-132). All FMC rated crane capacities are based on ideal conditions (Tr. 136-137, 139). The boom angle chart is bolted to the main chord of the boom (Tr. 133-134).

Witness Moody had no opinion whether respondent's crane was safe or unsafe; further, he had no opinion whether it could be safely operated at a reduced capacity (Tr. 151, 167).

Four main chords constitute the main section of the crane. Diagonal pieces, called lattices, connect the four chords together and provide rigidity. The resulting configuration is called a "picture frame" (Tr. 124, 168, 170). Chords, basically straight, will flex to some extent when the crane lifts a weight (Tr. 168).

The main chords can be checked with a stringline test. Such a test would be a means to determine if the chord is within acceptable tolerances contained in the factory specifications (Tr. 169, 170).

When a given weight being lifted by a crane is reduced there is a likelihood of less deflection in the chords (Tr. 156, 157).

FMC builds a safety factor into its booms. All of its capacity charts are based on an 85 percent tipping capacity of the machine (Tr. 171).

In December 1980 the Steelworkers' Safety and Health representative, Larry R. Parsons, handled a grievance concerning one of respondent's cranes. MC2 was not involved, but during the grievance hearing respondent's representative James Armstrong stated that one damaged strut tremendously reduces the lifting capacity of a crane boom (Tr. 179, 183, 184, 191, 193, 194).

Before respondent had any knowledge that an MSHA inspection would occur, various company officials conducted their own inspection of the cranes. Their inspection disclosed some damaged lattices on MC2. The company then posted a notice stating that the capacity of MC2 would thereafter be reduced by one third (Tr. 195, 196, Exhibit R1).

In February, or March, 1980 respondent weighed one section of an Ameron 36 inch tailings pipe. The company sent the Union a copy of the weight slip. It indicated that the pipe, filled with tailings, weighed 45,680 pounds (Tr. 200, 201, P18, P19). The company felt the Ameron pipe load had been within the 17.5 ton limit of the crane (Tr. 202).

Amin Alameddin 3/, a registered professional engineer with an extensive engineering background, testified at length in the case (Tr. 691-818, Exhibit P24). A substantial portion of his employment with MSHA deals with the evaluation of safety hazards as well as the structural analysis of different types of equipment (Tr. 695-697). He has also calculated the structural integrity of similar structures (Tr. 781).

The witness was familiar with the evidence in the case and he was knowledgeable concerning the structure of a tubular boom and its design principle (Tr. 700).

Each member of a boom has a specific function. Chords are designed to carry all of the actual bending movement. Lattices are designed to take the shear forces (Tr. 705, 706).

3/ Respondent's objections to Alameddin testifying as a rebuttal witness are discussed, infra.

Alameddin hadn't seen nor inspected MC2. But its lattice type tubular boom is based on a basic engineering design principle (Tr. 709-714, Exhibits P14, P15).

When a load is lifted, forces are transferred to various members. Each member is designed to carry a certain amount of force or stress. The allowable stress must be below or equal to the yield point (Tr. 716-719).

The stress limit of the member of a boom is based on the assumption that the member is perfectly straight. If a member, designed to carry two axial forces, starts to bow an amount of eccentricity is created (Tr. 719, 720, Exhibit P26). A bend or a bow is always a deformation that constitutes an irregularity in the member itself (Tr. 721, 723). Critical buckling stress is that stress where the material will buckle and fail (Tr. 718, 719). The buckling stress usually exceeds the allowable stress point (Tr. 718, 719). The elasticity limit is when a member, having been stressed, will not return to its original limit (Tr. 725).

Continual loading continues the stresses on a deformed member. In time, with continual loading, a deformed member will break (Tr. 727, 728). This is also true if you reduce the amount of the load (Tr. 728).

Maximum crane load ratings are based on the boom angle, boom length, radius of the load and the center of rotation to the center of the load. Exhibit 14 (page 2) contains different tables for the crane's lifting capacities (Tr. 748, 749). The lifting capacity is limited by the strength of the boom. The tipping load is that point at which the crane will tip even if the outriggers are set (Tr. 750-751). Rated capacities are based on 85 percent of the tipping load (Tr. 750, 751).

Witness Alameddin testified concerning the Secretary's photographs: Exhibit P1 shows a dent and a small bow. This member, as a result of continual loading, is between the elasticity point and the yield point. Continual stress will cause the member to break (Tr. 726). In Exhibit P6 the lattices are beyond the elasticity point. All five are bowed to the outside. These members were either overloaded or the crane was misused (Tr. 728, 729). The situation in Exhibit P6 involves additional stresses going into the chord irrespective of whether there is any measurable deflection in the chord (Tr. 729-730). If a lattice is missing (as in Exhibit P10) it will take 75 percent less stress to buckle the load (Tr. 731-733, Exhibit P27). Conversely, it will buckle with 25 percent of the allowable stress on the original (Tr. 732). A missing lattice causes other members to carry the load (Tr. 733).

Based on the yield point of materials manufacturers of booms set outside limits for permissible deflection. The limit is usually one inch in 36 inches (Tr. 734). Stresses still go into a chord. Even though there is no deflection in the chord in excess of 3/16 of an inch a boom could still buckle with continuous lifting and loading (Tr. 734, 735).

In reply to counsel's hypothetical question witness Alameddin stated that it was not safe to operate MC2 at any load capacity (Tr. 764-765). The lattices, bowed to the outside (Exhibits 6 and 12), show the equipment is unsafe and damaging the chord. A person in the field could not visually and with a stringline test determine whether it was safe to operate the crane at any reduced capacity. A person in the field could not measure the additional stress (Tr. 735, 737, 753-755, 765, 766). In order to measure the stress it is necessary to calculate, look at, and compute every single force on each member (Tr. 736). The only calculation done by Alameddin related to the missing lattice (Tr. 772).

Magniflux, or a dye penetrant, can be used to inspect a boom. Witness Alameddin uses a straight edge rather than a stringline to measure deflection. A stringline has problems if you are measuring horizontally whereas a straight edge gives a more stable line of reference (Tr. 739-741).

It is an established practice to discontinue using a boom and fix any members in the boom that may be damaged. In reviewing the literature the witness did not see any authority indicating that damaged lattices did not have to be immediately fixed before further use of the crane (Tr. 747, 748).

Witness Tony Cisneros also testified as a rebuttal witness. He stated that until his retirement he generally drove MC2, while Laney was its operator. Cisneros drove for about three years. For two years the auxiliary transmission would jump out of gear when it would go down hills in reverse (Tr. 680-683). This was reported to the company on every pink card (Tr. 685, 688). The company supervisors said they would fix the transmission (Tr. 687).

Respondent's evidence

Jackie Cooper, the general foreman of respondent's mechanical department, supervises the department which includes MC2. As a result of an unrelated discipline of an employee and a later grievance involving the No. 6 crane Cooper ordered all booms lowered. He further directed the operators to mark all damage with orange paint. These orders were issued on December 10, 1980. (Tr. 237-243, 283, 284).

On December 26 Cooper asked Don Lunt, (an experienced boiler shop foreman), and Emmet Baughman to accompany him on a visual

inspection of the cranes (Tr. 243-244, 247). These individuals considered and discussed a one third reduction for MC2. Laney and Cooper's supervisor, Bill Horner, concurred in the proposal. The reduction was explained to the crews and a notice (R1), posted in the crane cab, explained the reduction (Tr. 249, 256, Exhibit R1).

Respondent's foremen are expected to know the basic weights being lifted. After the one third reduction, assignments for MC2 were within its capacity (Tr. 255).

After the MSHA inspection, the local FMC representative sent its employee Palmer to the mine. After a visual inspection Palmer stated the company was operating the crane within a safe range. Cooper was confident in this view (Tr. 250, 264, 265, 276, 277). A boom has never failed at this worksite due to the malfunction of a lattice (Tr. 279, 280). The company had never received a complaint that MC2 was unable to safely lift pipe (Tr. 280).

In the course of its operations respondent maintains a daily schedule control form (R5). Among other data the form identifies the crew and the work order (Tr. 259, 295, 298, 299, Exhibit R5). The control schedule sheet is the only one identifying the work project for the motor cranes (Tr. 298). This form is filled out in pencil when Cooper reviews it with his foreman before the start of a shift (Tr. 292, 293). The exhibit shows Laney was working on motor crane No. 3 on January 7, 1981 (Tr. 263).

All pink cards (vehicle safety inspection form) are turned into Cooper's office, although he doesn't receive a card each day for each crane (Tr. 326-328). Cooper produced at the hearing all of the pink slips for MC2 subsequent to October, 1980 (Tr. 328-330). Laney, who is responsible as the crane operator, signed 28 of the 30 pink slips (Tr. 331, 332).

The pink cards reflect the following: one slip, dated December 15, 1980 and signed by Laney, refers to the lattice on boom (Tr. 349). On December 19, bad lattice is noted on the boom (Tr. 350). On December 22 Laney reported the boom lattice was bent. On December 29 and January 8, 1981 the lattice was marked B.O. (bad order). It was also noted on the cards under dates of December 28, 1980, December 29, 1980 and January 8, 1981, that the auxiliary transmission was jumping out of low range (Tr. 349-350). The report dated December 28, 1980 was Laney's first written report indicating the transmission was defective (Tr. 245-266). On the following day Cooper became aware of the notation indicating there was a transmission problem. Bradford, at Cooper's direction, checked the problem and presented Cooper

with a repair order (Exhibit R6). Work orders go through planning, to scheduling, and then to the garage for the actual repairs (Tr. 266-269, 352). Before the repairs were undertaken the MSHA inspection intervened. The crane was not out of service until the MSHA withdrawal order (Tr. 271, 275, 341, 342).

Chappell, the repair shop general foreman, advised Cooper that they could find nothing wrong with the transmission. The repair order indicates the gear boxes were checked and found to be "okey." The shift control linkage was also "okey." The garage completed its repairs in four hours. The only repair noted on the form was an increase in the poppet ball spring tension. There were no other repairs to the transmission from January 12, 1981 to the time of the hearing (Tr. 271, 347, 348, Exhibit R6).

After the work by the repair shop Cooper ordered road tests. In a road test on January 13, 1981 Tipton and DeLeon could not get MC2 to jump out of gear. The following day Laney and Cisneros had the same result (Tr. 344, Exhibits R4, R7).

William Horner, assistant mechanical superintendent and Cooper's supervisor, was familiar with the R.O. Saeny grievance of December 1980 involving a crane, not MC2 (Tr. 396-398). The grievance involved the failure of an employee to report damage to company equipment. The Steelworkers filed the grievance. As a result of the hearing on the grievance, in mid December, Cooper directed that all crane booms should be thoroughly inspected by their respective operators. The operators were to report any damage or improper conditions in the booms. Laney, as the operator, spray painted MC2. (Tr. 400, 401).

Approximately on January 4, 1981, before the MSHA inspection, the company asked Marco Equipment to estimate the repair costs and to proceed with the boom repairs (Tr. 403). In the interim Cooper, under Horner's supervision and involvement, ordered a one third reduction in all modes of operating MC2. (Tr. 403, 409). Laney completely agreed. One factor leading to the one third reduction evolved when Laney lifted, without incident, a 26 ton crusher main frame. On that lift the crane boom was extended at 80 feet (Tr. 406). The company's notice of the one third reduction was posted in the crane. From the time of the reduction until the MSHA inspection, the crane was operated at the reduced capacity.

The Marco Company had been scheduled to inspect the boom on MC2 on January 13, 1981. But due to the MSHA inspection of January 8, 1981, the Marco representative accelerated his inspection (Tr. 410-412).

Buck Palmer, Marco's field representative, arrived on

January 9. Repairs to the boom were made by Marco in accordance with Horner's instructions (Tr. 413). After abatement of the citation MC2 was returned to service (Tr. 416).

Witness Horner was familiar with the vehicle safety inspection reports (pink slips) on MC2. The claimed defects did not appear until after the operators painted the booms. (Tr. 406, 408). In December 1980 some pink slips mentioned the transmission. The transmission report lead to a subsequent work order to repair it. From the time of the initial pink slip report on the transmission the crane was working on level ground in the Silver Basin tailings dam project (Tr. 41, 419). The handwritten complaint on Exhibit P20 ^{4/} stated that the auxiliary transmission was jumping out of low gear (Tr. 420).

The repair shop found nothing mechanically wrong with the transmission. A routine road test, which consisted of driving the crane up a long steep grade, failed to reveal a problem with either transmission (Tr. 420, 421, 425). The road test sought to simulate the conditions under which the problem had been reported (Tr. 425, 426).

Horner, a former mine master mechanic, is familiar with transmissions. He indicated that the poppet ball spring on the transmission was repaired. But that spring does not keep the transmission in gear. Further, it had no adverse effect on the operation of the transmission (Tr. 420, 429, 430). Nothing in the transmission was found to be in need of repair and the crane was returned to service (Tr. 431). A transmission will jump out of gear if it is not fully and properly engaged by the operator (Tr. 431).

The hearing on the R.O. Saeny grievance focused on the failure of the crane operator to report damage to the equipment. At the hearing respondent's representative Armstrong stated that unreported damage could lead to a serious condition. He did not state that any specific number of damaged lattices would render a crane unsafe (Tr. 432, 433).

According to witness Horner the auxiliary transmission of MC2 does not have a reverse gear (Tr. 820).

Gordon L. Palmer, a person experienced in booms, testified. He operates the boom repair service for the Marco Company (Tr. 525-527, 532).

^{4/} Exhibit P20 consists of 29 separate vehicle safety inspection forms. They are also referred to as "pink slips." The initial form is dated October 25, 1980 and the last form is dated January 8, 1981.

On January 9, 1981 Palmer inspected MC2. The inspection consisted of a visual walkdown over the entire boom, lacing by lacing. Stringline tests failed to establish any vertical or horizontal distortion. The chords were true and there was no distortion to the picture frames (Tr. 530-531).

Palmer, who is not a graduate engineer, relies on visual inspection and stringline tests to check the integrity of a boom. There are no calculations that can be made to determine whether a boom is unsafe (Tr. 533, 534).

Palmer found that several spray painted lacings were outside the limits of the manufacturer's recommended tolerances. Most of the bowed lattices were located in the tip area which contains the greatest concentration of lattices. (Tr. 540-542). The damage indicated that the block may have been swinging into the lacings (Tr. 541).

Lattices hold the chords and picture frames together. They maintain the integrity and alignment of the boom. The chords, acting as a column, carry the load when the boom is in the air. The lifting of an object causes a slight bowing or flexing of the chords. The chords return to their true position when the object being lifted is released (Tr. 543, 544).

The chords were not out of alignment. This indicates there was nothing outside the realm of specifications pulling against the boom or pushing the chords in and out (Tr. 544). The picture frames were within the manufacturer's specifications. On January 9 Palmer did not do a structural load test but the 26 ton lift was within the manufacturer's load chart. The crane would have passed a load test before the lattices were replaced (Tr. 544-548). Nothing suggested to Palmer that the crane was unsafe (Tr. 548).

Horner instructed Palmer to bring the condition of the crane to one hundred percent of the factory specifications (Tr. 550). On January 9 the chords, the picture frames and all sections were within factory specifications. Half of the lattices that were painted should not have been (Tr. 546, 550). If the lattices were not performing their function distortion would appear in the chords (Tr. 551). Link Belt cranes have a safety factor of 15 percent over the rated capacity (Tr. 552).

Witness Palmer denies ever telling MSHA inspectors that MC2 was unsafe. Likewise, he denies ever stating that a boom with two damaged lattices should go out of service (Tr. 553, 554).

After the necessary repairs were made by Palmer an independent testing laboratory tested the boom and certified the

crane back into service (Tr. 549). Certification is a standard procedure (Tr. 566). The company, known as Diversified Inspections, a testing laboratory, used a dye penetrant test, a magniflex on the lattices, and a 10 percent structural overload test (Tr. 566-568). These are accepted tests and more accurate than a visual test. Palmer did not do any of the three tests performed by Diversified (Tr. 568-570). Nor did Palmer do any sort of calculations to determine the stress placed on each boom member (Tr. 569-570).

Palmer found that 17 or 18 lattices were deformed (Tr. 577-578, 589, 592). Fifteen lattices were probably bowed less than an inch. Two or three were in excess of that figure (Tr. 588). Three of the deformed lattices were in a 36 inch span; 14 were within a one inch span (Tr. 592).

The three deformed lattices with a deflection exceeding factory specifications were on the left side of a 20 foot section in one of the middle sections of the boom. One section had a missing lattice near the point section (Tr. 593, 594).

In determining factory specifications witness Palmer relied on the manufacturer's servicegram appearing in Exhibit P15 on page 6, paragraph C. The servicegram states that lattices or diagonals with a uniformed curvature not in excess of the ratio of one inch in three feet may be straightened (Tr. 595-596). Palmer believes those lattices needing repairs are those kinked beyond their integrity (Tr. 600). A lattice bowed beyond the manufacturer's specifications will affect the integrity of the boom (Tr. 604). However, if a lattice is bowed less than one inch the integrity of the boom is not affected (Tr. 606). Palmer's opinion, supported by his three years of design engineering, is based on his 25 years of experience. He does not rely on any literature nor the procedures of any manufacturer (Tr. 608, 609).

Discussion

Certainly the evidence here does not want for credibility issues.

In this case the gravamen of a violation of § 55.9-2 focuses on whether there is an equipment defect and whether that defect affected the safety of the equipment.

At the outset I find there was an equipment defect in the crane boom. The uncontroverted evidence establishes that the crane boom had one missing lattice and an additional 17 or 18 lattices were deformed in varying degrees. Having found that there was an equipment defect we will now consider the pivotal question of whether the defects affected the safety of the crane.

On the issues concerning the boom I credit MSHA's evidence. The credibility issues of whether the boom defect affected its

safety principally clash in the testimony of MSHA's witness Alameddin and respondent's witness Palmer. I credit Alameddin's opinion, in part due to his substantial educational background (Tr. 692, 693, Curriculum Vitae in P24), and his experience (Tr. 695-697). He was familiar with the structure here, namely, a tubular boom and its design principle (Tr. 700). Witness Alameddin, as noted in the summary of the evidence, had reviewed the testimony in the case and he reached certain unequivocal opinions to the effect that it was unsafe to use MC2 with any weight attached to the boom (Tr. 453-455, 764-765). It was further unsafe to operate at any reduced lifting capacity such as the reduced one third capacity set by respondent (Tr. 765).

Witness Alameddin also pointed out the inherent difficulties with Palmer's stringline test method (Tr. 739-741). Alameddin further reviewed the literature in the field and he found no literature indicating that damaged lattices did not have to be fixed before further use of the crane (Tr. 747).

On the other hand, I am not persuaded by respondent's contrary evidence. It's principal witness, Palmer, has considerable field experience. But he basically relies on visual inspection and a stringline test. Palmer, as a certified welder, would no doubt be adept at repairing the boom. But as a high school graduate and lacking a degree in engineering he simply lacks the necessary expertise in this case (Tr. 539, 563). In addition, I believe that the boom on the 45 ton crane would be unsafe even under the conditions found by Palmer.

Respondent's evidence: Witness Palmer found 17 deformed lattices and a missing lattice (Tr. 577-578). The service manuals received in evidence show the complexity of the HC-108B carrier mounted crane. The service manual states in part in Exhibit P-15, page 1 (3rd page in exhibit) as follows:

(c) It is very important to maintain the supporting lattice work on a tower, boom or jib section in good condition. Damaged lattice allow deflection of the main chord tubes under load so that they are no longer in line; this destroys the true column effect of the boom. The result is reduced boom strength and capacity.

Further, the FMC service manual states, in part, in Exhibit P16, on page 2 of 6 as follows:

Lattice, Diagonals, and Picture Frame Repair
Lattice, picture frame angles, and diagonals must be kept in good condition to hold the chords in proper alignment. Bent lattice cause deflection of the main chord angles so they are no longer "in line", thus reducing and partially destroying the load capacity of the boom.

A good percentage of damaged lattice can be straightened by conventional methods. If the damage to the lattice is beyond repair by straightening, such as a severe twist or kink, it must be replaced.

Further, the photographs (Exhibit P1-P12) support Alameddin's testimony.

In sum, I am persuaded by the Secretary's evidence and not persuaded by respondent's contrary evidence.

Respondent, in its brief (pages 13, 14) initially urges that the historical facts support its case. These facts are that the crane proved itself in normal usage by lifting a crusher main frame. Further, crane operator Laney could muster no evidence indicating that the boom had a defect.

In my view the lifting of the crusher mainframe was accomplished, fortunately, without any adverse effect. In its defective condition, the boom could have collapsed when it lifted the 26 ton weight. I agree that Laney failed to establish (before he painted the boom) that there were any defects that affected its safety. However, I would not anticipate that a crane operator would have the expertise to know whether or not the boom was defective.

Respondent in its post trial brief, (page 12 et seq.) further states that 14 or 15 of the 19 lattices may have had a "ding" or slight "bend" but it is the condition of the boom and all 154 lattices as a whole that controls. Respondent argues that since the chords, and picture frames in combination with the lattices were within factory tolerances then there was no defect "affecting safety" and hence no violation.

I disagree. Witness Alameddin's testimony addresses these issues: each member has specific work to do, (Tr. 705), to carry its share (Tr. 716); each member is designed to carry axial forces (Tr. 706); if a member starts bowing an amount of eccentricity is created (Tr. 720, Exhibit P26); a bend or a bow is always a deformation that is an irregularity in the bow itself (Tr. 721-723); elasticity limit is where a member will not go back to its original shape (Tr. 725); the dent and bow in P1, P2, P6, P12 will eventually break from continual stressing (Tr. 726); a break will occur when you have continued loading on a deformed member (Tr. 727-728), also this is true even though you reduce the amount of the load (Tr. 728); in P6 there are additional stresses going into the chord regardless of any measurable deflection (Tr. 729-730, 734); even though there is no deflection in the chord in excess of 3/16 of an inch the boom could still buckle with continuous lifting and loading (Tr. 735); in P6 and P12 five lattices were all bowed to the outside, this was unsafe and damaging the chord though it is difficult to measure (Tr. 735); the zone on P26 (illustrative drawing) between elasticity point and yield point will change because more lifting will increase the stress, and ultimately the member will break (Tr. 736); the missing lattice (P10) increases the length of the free

span; calculating this as $2L$ (L/R is slenderness ratio) it takes 75 per less stress to buckle the load (Tr. 731-733).

Respondent further attacks Alameddin's testimony for various reasons. These follow:

Alameddin had not inspected the crane and he lacked firsthand knowledge of it. I agree. But an expert witness is not required to have first hand knowledge. Nanda v. Ford Motor Company, 509 F. 2d 213, 221 (7th Circuit). In fact, hypothetical questions as were used in this case, are no longer necessary. Rule 702, Federal Rules of Evidence. In any event it is clear that Alameddin reviewed all of the data including photographs and the prior testimony in the case. This is sufficient for him to form an intelligent opinion.

Respondent asserts Alameddin's calculations did not address the boom as a whole but that he based his opinion on a hypothetical analysis as to the location of a single lattice but he didn't know where the lattice was located.

I agree that Alameddin performed a minimal amount of mathematical calculations. However, at issue is his ultimate opinion and its factual basis. That opinion is reflected in this decision. The verbatim testimony appears in the transcript at pages 735, 753-755, 759, 764-765.

Respondent objects to Alameddin giving sweeping conclusions about the crane as a whole when he could not address the lifting capacity of the crane.

In my view that the lifting capacity of the crane and whether the crane is unsafe due to its defects are totally different. In order to render an opinion on the lifting capacity of the crane the witness stated he would want to inspect the crane, measure everything on it, check for extra stresses such as from a bowed member (as in exhibit P6, if all members bowed there is strain on the chord). Also, he would want to know the tensile strength, yield point, configuration and angle of the boom, width of lattice metal, angle of the taper of the boom; further, he would want to know about the gantry and about the cable. Further, witness Alameddin disavowed any attempt to render an opinion on the lifting capacity of the crane (Tr. 795). In short, he was not testifying to the precise load the crane would carry before it buckled (Tr. 803). Further, he had analyzed other structures based on the same design principle and he did not need to know the weight of a load to give an intelligent answer concerning whether the crane was safe to operate (Tr. 807).

But the witness explains that he did not need all of the precise information, blueprints, etc. to render an opinion as to whether a crane is safe to operate. (Tr. 800). The additional detail is only necessary for a full structural analysis. Here, there were too many deflections. This rendered the crane unsafe for use (Tr. 800, 801).

Respondent declares that in previous cases opinions rendered by Alameddin had only followed after he had made a personal inspection. I concur the evidence confirms respondent's statement. However, this argument addresses the weight to be given Alameddin's testimony. As previously noted, I find his testimony credible.

Respondent objects to Alameddin testifying that the lattices had an effect on the chords and that it was so small that Palmer would have found it "very difficult to measure." He claimed, however, he could see it from the photographs. At the same time respondent argues no basis in fact upon which to conclude that the chords were other than straight.

This foregoing argument confuses different aspects of the testimony. Not only Witness Alameddin but the judge can clearly see the bowed and kinked lattices. See Exhibits P1, P2, P3, P6, P7, P8, P10, P11. The point is, given the circumstances here, there apparently was not any deflection in the chord. But not withstanding that fact the boom, in Alameddin's opinion, could still buckle (Tr. 734). I find that opinion to be credible.

Respondent states that Alameddin never designed a boom and never worked on booms. True, the witness has not designed a boom. But he had done a number of evaluations on structural analysis for different components and different structures including head frames, drum construction, drum design, dragline boom collapse, stability problems, evaluation of a storage bin design, et cetera (Tr. 696). Also, in accordance with his training as an engineer, he was familiar with the structure of a tubular boom and with its engineering design (Tr. 700). Alameddin's testimony on the whole demonstrates his knowledge of the field.

Respondent, in its brief, recasts its objection to Alameddin's lack of first hand knowledge of MC2. But I find that he demonstrated a thorough knowledge of the facts of the case. He had been present at the December 1982 hearing and had reviewed the transcripts of March 1982 hearing (Tr. 700).

In sum, I find that Alameddin had an extensive factual foundation to render his opinion.

Respondent claims that the legal test of whether the condition of the boom affected its safety is geared to the

judgment of the people whose experience in the industry put them in the best position to evaluate the situation (Brief, page 26). Therefore, respondent's evidence should prevail. In support of its position respondent cites the Commission decision of Alabama By Products Corporation, 4 FMSHRC 2128 (1982). The cited case involves, by analogy, a regulation similar to § 55.9-2.

Respondent misconstrues the Commission decision. In Alabama By-Products the operator was arguing that a similar regulation, (30 C.F.R. 75.1725(a)), was unconstitutionally vague on its face. In disposing of this argument the Commission ruled that "the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with factual circumstances surrounding the allegedly hazardous condition including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation" Alabama By Products at 2129. Respondent's evidence is not entitled to any type of preferential consideration over the Secretary's evidence. It is the complete record that is to be evaluated. On that basis I conclude that a violation occurred.

Further, various portions of respondent's evidence are at times contradictory. Respondent claims that since there was nothing unsafe about the crane at full capacity, and it necessarily followed there was nothing unsafe at two-thirds capacity (Brief, page 27). Respondent's position is contradicted by the fact that it voluntarily reduced the crane's capacity before the MSHA inspection.

Respondent's contentions that the crane was safe at full capacity and necessarily at two-thirds capacity are rejected. The citation should be affirmed.

Auxiliary Transmission

The evidence on this issue is contained in the summary of the evidence. To briefly encapsulate it:

When in low gear the auxiliary transmission on MC2 would periodically jump out of gear. The operator and driver complained to the MSHA inspectors in January 1981 and also advised the company by noting the defect on the vehicle safety inspection forms (pink slips). This hazardous condition existed for a year or two.

Respondent's pink forms show Laney's first report was dated December 28, 1980. This was after the booms had been painted.

The company began transmission repairs. The repair shop found no transmission defect and two road tests failed to reproduce the complained of condition. The vehicle was returned to service and no repairs were thereafter made to the transmission.

Discussion

It is my view that if the auxiliary transmission unintentionally slipped out of gear while the crane was being operated there would be a violation of the regulation. But on the issues concerning the auxiliary transmission I credit respondent's evidence. I reach this conclusion based on several factors: Laney and Cisneros both indicated the transmission problem had existed for sometime, certainly as long as a year. Also I agree that such a condition, if it existed, would be exceedingly hazardous to the crane operator, the crane driver and persons in the immediate vicinity. Such an unsafe condition would be one that would be quickly reported. Laney was never hesitant about reporting defective conditions on MC2. But the vehicle report forms do not contain a reference to the auxiliary transmission until December 28, 1980 when the following notation appears: "Aux. transmission jumping out of low range" Also appearing on the form is the notation of "W.O.CG." (Exhibit P20 ⁵/, 12/28/1980).

If a transmission defect existed, one would think it would appear on the report forms before December 28, 1980.

I am further persuaded by witness Horner's testimony. As a former qualified master mechanic he was familiar with transmissions. The repairs in the shop (increasing tension on the poppet ball) did not affect the transmission. In addition, no defect was found in the transmission.

⁵/ At this point an explanation of Exhibit P20 is in order: The exhibit is designated by a single number and it consists of 29 separate report forms each bearing different dates. Each form contains a line for the operator to sign and a place to enter the date and type of equipment involved. The format also lists 13 specific items to be checked under the "OK" or the "B.O." column. The exhibit received in evidence, contains reports for MC2 beginning October 11, 1980. In 1980 are October 11, 22, 23, 24, 25, 26, 27, 28, 29, 30. November 11, 14, 17, 18, 25, 30. December 1, 15, 16, 19, 22, 26, 27, 28, 29, 30, 31. Exhibits 20 also contains vehicle inspection reports for January 2 and 8, 1981. Exhibits R2 and R3 are two vehicle inspection forms submitted on the day of the inspection. Only one appears in Exhibit P20. Exhibit P20 is a record kept in the ordinary course of business. I further find it to be authentic and credible.

The Secretary's post trial brief (page 2) urges that a transmission slipping out gear is a defect within the meaning of Section 57.9-2. In support of his position he cites the writer's decision in Allied Chemical Corporation, 4 FMSHRC 503 (1982). The cited case, pending on review, is not as broad as the Secretary claims. The view I expressed is necessarily limited by the facts. In Allied Chemical a violation was found to exist because large soft steel bolts in two different chocks were missing. Obviously, the manufacturer included steel bolts for a purpose. Hence, the statement appears in the decision that Allied violated the standard because the steel bolts were missing.

In this case the evidence fails to show there were missing, worn, or damaged transmission parts. I am further persuaded by respondent's contrary evidence. In short, I do find that there was a defect. Accordingly, that portion of the citation relating to the auxiliary transmission should be vacated.

Issues raised in the Hearing

Respondent renewed its objections to the presentation of witness Alameddin as a rebuttal witness (Brief, page 22). It is asserted that Alameddin should properly have been presented in the Secretary's case in brief. Since he was not so presented the non-rebuttal testimony should be excluded (Tr. 701).

The judge ruled that the complete testimony of witness Alameddin was generally admissible (Tr. 701-704). Further, the judge indicated he would grant respondent an opportunity to meet any issues raised in the rebuttal (Tr. 703, 704). No request was made.

The Administrative Procedure Act (A.P.A.), 5 U.S.C. § 551 et seq. adopted by Commission Rule 1, 29 C.F.R. § 2700.1, sets forth the procedural rights of the parties under the Mine Safety Act. The A.P.A. provides, in part, at 5 U.S.C. 556 as follows: "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the facts." Hearings before administrative agencies do not require strictness in the observation of the rules of evidence if fundamental fairness is observed. Rosedale Coal Co., v. Director of U.S. Bureau of Mines, 247 F. 2d 299 (C.A. 4, 1957). In the instant case respondent had the opportunity to present evidence to meet all issues raised by Alameddin's testimony. Respondent's objections are again overruled.

At the hearing the judge received, subject to respondent's objections, the testimony of witness Alameddin as to findings developed from literature in the field pertaining to damaged crane booms (Tr. 742-748).

Under Rule 703 of the Federal Rules of Evidence the pertinent inquiry is whether the facts are of a type reasonably relied on by experts in the particular field. Since the answer is affirmative the evidence was properly received and respondent's objections are overruled Bauman v. Centex Corp., 611 F. 2d 1115, 1120 (5th Circuit).

Respondent's post trial brief renews its objection made at the trial that the testimony of witness Moody should be excluded. The basis of the objection was that the Secretary failed to disclose Moody as a witness in the case (Tr. 113-117).

There may well have been discovery sought in other cases about the same time involving the parties (CENT 80-349-M and WEST 81-296-M). But the judge permitted Moody to testify because there had been "No discovery sought or ordered by the Commission in this case" (Tr. 114). While there was a combined notice of hearing there was no order consolidating the cases. I adhere to my original ruling and permit the testimony of witness Moody.

At the trial the judge refused certain of the Secretary's exhibits (Refused Exhibits P29, P30, P31). The ruling involved the scope of Rule 803.18, Federal Rules of Evidence. (Tr. 815-818). Since the Secretary did not renew his objection in his post trial brief it is not unnecessary to review the ruling in this decision.

Civil Penalty

The six criteria for assessing a penalty are set forth in 30 U.S.C. § 820(i). The parties stipulated that the operator had 52 assessed violations in the two year period prior to 1980. A penalty would be appropriate and would not affect the operator's ability to continue in business. I consider the operator was negligent because it knew there was a boom problem about December 10 when the boom was lowered and the fluorescent paint was applied. But no remedial action was taken for the boom repair until the MSHA inspection on January 8, 1981. The gravity is severe since a boom collapse would be an extreme hazard to employees operating the equipment and others in the vicinity. Respondent demonstrated extreme good faith in the situation.

On balance I deem that a civil penalty of \$1,000 is appropriate.

Briefs

The Solicitor and respondent's counsel have filed detailed briefs which have been most helpful in analyzing the record and defining the issues in the case. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

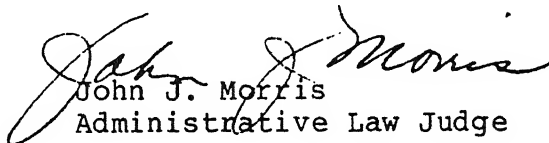
Consistent with the facts found true in the narrative portions of this decision, the following conclusions of law are made:

1. The Commission has jurisdiction to hear and determine the issues raised in this case.
2. Respondent violated the safety standard published at 30 C.F.R. § 55.9-2 as it relates to the crane boom as alleged in Citation 379902. That portion of the citation should be affirmed and a civil penalty of \$1,000 should be assessed.
3. Respondent did not violate the safety standard published at 30 C.F.R. § 55.9-2 as it relates to the auxiliary transmission as alleged in Citation 379902. That portion of the citation should be vacated and all penalties proposed therefor should be vacated.

Accordingly, I enter the following:

ORDER

1. Citation 379902 as it relates to the crane boom is affirmed. A penalty of \$1,000 is assessed.
2. Citation 379902 as it relates to the auxiliary transmission is vacated. All penalties therefor are vacated.


John J. Morris
Administrative Law Judge

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/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
March 28, 1984

DAVID L. WILLIAMS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 83-122-D
	:	
SOUTHERN UTAH FUEL COMPANY,	:	MSHA Case No. DENV CD
Respondent	:	83-15

ORDER OF DISMISSAL

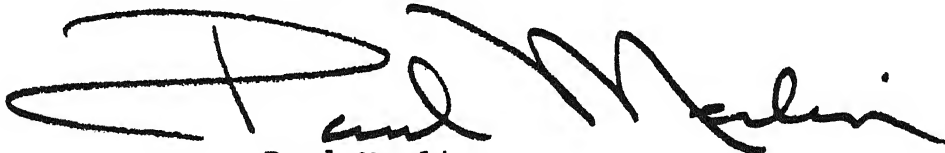
Before: Judge Merlin

On September 27, 1983, Complainant filed with this Commission a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. An order was issued on November 22, 1983, to Complainant so that he might show cause why his complaint should not be dismissed for failure to provide certain information. This order was returned to the Commission as "unclaimed" on December 19, 1983.

On January 5, 1984, my law clerk attempted to telephone Complainant in this regard but found the phone was disconnected. A second order to show cause was issued on January 6, 1984. This order was returned to the Commission on January 13, 1984, marked "moved, left no address."

It must be assumed that Complainant has abandoned intent to pursue this discrimination claim. The period allowed for response has expired and no reply has been received from Complainant nor has he been able to be reached.

Accordingly, the case is DISMISSED.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

MAR 29 1984

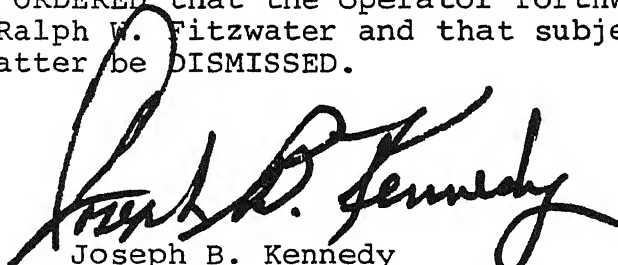
RALPH W. FITZWATER, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. YORK 83-3-D
: MSHA Case No. MORG CD 83-11
METTIKI COAL CORPORATION, :
Respondent :

DECISION

Before: Judge Kennedy

This matter is before me on the parties' stipulation for settlement and motion to withdraw the captioned discrimination complaint. A review of the stipulation shows it is in accord with the purposes and policy of the Act and agreeable to the Complainant.

Accordingly, it is ORDERED that the settlement be, and hereby is, APPROVED and made a part of the record of this proceeding. It is FURTHER ORDERED that the operator forthwith pay the sum of \$22,000 to Ralph W. Fitzwater and that subject to payment the captioned matter be DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

MAR 30 1984

PONTIKI COAL CORPORATION,
Contestant-Respondent

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent-Petitioner

: CONTEST OF CITATION
: AND COMPANION
: CIVIL PENALTY PROCEEDING
:
: Docket No. KENT 83-181-R
: Citation No. 2052746; 3/1/83
:
: Docket No. KENT 83-262
: A.C. No. 15-09571-03527
:
: CONTEST OF ORDERS
: AND COMPANION
: CIVIL PENALTY PROCEEDINGS
:
: Docket No. KENT 83-182-R
: Order No. 2052747; 3/1/83
:
: Docket No. KENT 83-183-R
: Order No. 2052748; 3/1/83
:
: Docket No. KENT 83-184-R
: Order No. 2052750; 3/1/83
:
: Docket No. KENT 83-256
: A.C. No. 15-09571-03526
:
: No. 2 Mine

DECISION

Before: Judge Kennedy

For twenty-four (24) production shifts worked during the period February 3 through February 28, 1983, the operator, Pontiki Coal Corporation, failed to make or record preshift

and onshift examinations of its main belt entries in flagrant violation of section 303(d)(1), 30 C.F.R. § 75.303 of the Mine Safety Law. 1/ On February 28, 1983, five MSHA inspectors were sent to inspect the mine for the existence of imminent dangers and other violations of the law. They noted the failure to report the results of preshift and onshift examinations on the beltlines. This should have alerted them to conduct a physical examination of these areas. Instead, they inspected only the area from the bottom of the slope entry to the main beltline outby for 100 feet and then proceeded to the track entry where they rode a personnel carrier to the end of the beltline and then inspected another 300 to 500 feet of the area inby the beltline.

As a result of this dereliction, the inspectors failed to observe or cite the operator for what they later described as an "enormous" accumulation of float coal dust, much of it in suspension, amidst a chaotic scene of worn, stuck and damaged rollers, worn and broken suspension brackets and bottom belts lying on the floor in excessive accumulations of loose coal and coal dust. These conditions, which existed for some 4,800 feet of the main beltline presented a condition of imminent danger of a disastrous fire or explosion in a mine described by the operator's counsel as "one of the gassiest in Eastern Kentucky."

1/ On March 9, 1984, the United States Court of Appeals for the District of Columbia Circuit reversed the Commission's decision of July 15, 1983, upholding a clearly erroneous decision by Judge Laurenson that issued July 1, 1981. Jones & Laughlin Steel Corporation, 3 FMSHRC 1721 (ALJ, 1981), affirmed, 5 FMSHRC 1209 (Comm'n, 1983); (Commissioner Lawson dissenting), reversed at instance of United Mine Workers of America on March 9, 1984, _____ F.2d _____ (D.C. Cir). The action by the court of appeals, dispelled the cloud of confusion cast over the enforcement of 75.303 by the ALJ's obviously inept understanding of the plain language of the standard. In finding "no basis for the Commission's senselessly narrow construction of the" standard, the court held that the statute and its congruent regulation require both preshift and onshift examinations of belt entries. The court was especially concerned over the hazards of fire and explosion to which miners are exposed when operators fail to make preshift and onshift examinations of belt entries "for several days."

The record strongly suggests that the reason the inspectors were "persuaded" to tour around the main beltline and ignore the "message" of the omitted preshift and onshift reports was to permit the operator to run coal for one more shift and management to "voluntarily" idle the mine and begin cleanup operations. Indeed, the record shows that in return for the "advance notice" of the "spot" inspection that did not begin in earnest until March 1, 1983, the operator idled its production at 3:30 p.m., on Monday, February 28 and began cleanup. The record also shows that in return for the operator's "cooperation" the inspectors expected to issue only 104(a) citations but were so appalled by the conditions actually encountered they felt compelled to issue unwarrantable failure citations and closure orders. 2/

It is undisputed that the conditions found significantly and substantially contributed to the hazard of a mine fire or explosion that could have killed all 21 miners and the five inspectors in the mine on February 28 when the beltline was energized. Nevertheless, the operator's vice president for operations, Dennis Jackson, felt he had been double crossed or "doubled barrellled" as he put it. For this reason, he abruptly terminated the closeout conference and thereafter filed his notice of contest of the citation, orders, and proposed penalties. 3/

2/ Because of the stigma that attaches to the unwarrantable failure citation, management begged the inspectors to issue 107(a) imminent danger closure orders. In the response, the lead inspector said "I explained that the conditions I found were unwarrantable and significant and substantial, but did not constitute an imminent danger because there is no immediate source of ignition for the float dust. They offered to start the belt to create an imminent danger to keep off the unwarrantable failure sequence. Mr. Adams stated 'We'll start the belts if that's what it takes to get a 107(a) imminent danger order issued.' I replied that the belts were already under closure orders" and therefore could not be started until the conditions were abated. It seems clear that by this time the MSHA inspectors were no longer willing to turn a blind eye to the conditions encountered. Apparently, there are limits beyond which inspectors will not go to honor the administration's pledge of "cooperative enforcement."

3/ The record of the closeout conference of March 1, 1983 states: "During this closeout conference, Dennis Jackson, stated that he felt we were being unfair to the company and that he felt we had 'doubled barrellled' them in reference to the citations on records of belt examinations and citations and orders written on the conditions found in the belt line. Dennis left the conference abruptly and we felt it was best to leave at this time."

Counsel for the operator readily admitted the conditions cited existed 4/ but raised in mitigation of gravity and culpability the fact that (1) MSHA had condoned the conditions when it inspected the mine on February 28 and (2) that the operator had "voluntarily" idled the mine and set the production crews to work cleaning up the mess. MSHA was sympathetic to these pleas. The Assessment Office declined to specially assess any of the violations choosing instead to treat them separately and in isolation rather than as an intertwined and interconnected whole. This meant that the matter did not have to be referred to the office of special investigation for a determination of whether responsible members of management should be prosecuted for "knowingly" authorizing these imminently dangerous and hazardous conditions or criminally for "willfully" violating the law. In addition, the Assessment Office granted the operator a gratuitous 30 percent discount for prompt abatement of the most serious 75.400 violation. This mystified everyone since the conditions were so bad it took the operator five working days to cleanup, repair and rock dust the belt entries.

The record shows the MSHA inspectors expected the cleanup to be completed by March 3 but when they returned on Thursday, they found that while over 10 tons of highly combustible materials had been removed, the work was still only half done. The cleanup was not completed and the orders terminated until the following Monday, March 7, 1983.

The Assessment Office proposed initial penalties of \$2,294 for the four violations charged or an average of \$574 per violation. As a reward for the operator's challenge, the Solicitor offered to settle the four violations at a discount of some 18 percent or a total of \$1,900. 5/

By the time this matter came on for a prehearing/settlement conference on February 7, 1984, MSHA knew or should have known that the operator had knowingly, if not willfully, created and maintained an imminently hazardous condition in this mine for over 2 weeks. Yet here is nothing in the record to suggest that anyone in authority in MSHA ever took note of the seriousness of

4/ Indeed, while counsel said his client would not like it, he felt enforcement action was badly needed at this mine and that "it was the best thing that ever happened to this mine . . . because they were operating pretty lax."

5/ Under MSHA's "cheaper by the dozen" policy, the thirty occurrences observed were lumped into just four violations. Thus, from the operator's standpoint, the one that counts, the Solicitor was offering to settle the over two dozen violations observed for \$63.30 each, a bargain by any standard.

this case or sought to hold accountable those in positions of authority in the Pikeville or Paintville, Kentucky offices of MSHA for ignoring the conditions of wanton, if not criminal, endangerment that existed on February 28, 1983. It was this type of callous indifference and dereliction on the part of the Pikeville district that led to the Scotia disaster in which 26 miners and inspectors lost their lives on March 9 and 11, 1976.

Section 103(a) of the Mine Act prohibits giving advance notice of any enforcement inspection and section 110(e) provides that "any person who gives advance notice of any inspection to be conducted under this Act shall, upon conviction, be punished by a fine of not more than \$1,000 or by imprisonment of not more than six months, or both."

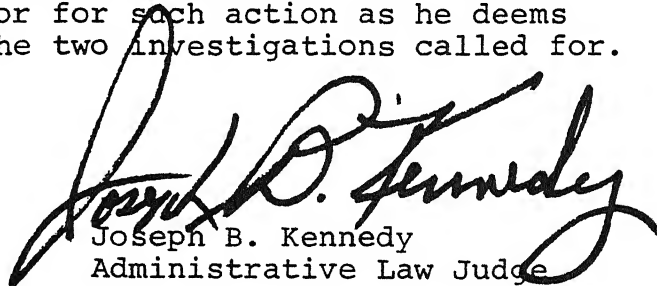
The true circumstances surrounding the truncated inspection of the beltline on February 28 cry out for investigation and explanation. The public is entitled to know what occurred on that date that later led the operator's vice president for operations to feel he had been "spun" or "double barreled" by MSHA. Was there a hidden quid pro quo for the abbreviated inspection of the beltline on February 28, and, if so, what was it? Was the abbreviated inspection of the beltline designed to alert the operator to the real inspection that commenced the next day? Or was MSHA innocent to the point of naivete? And, if so, what is the public to conclude about MSHA's capacity to serve as a sophisticated enforcement agency? I believe these and other questions deserve an answer. I recommend, therefore, that this matter be referred to the inspector general of the Department of Labor for a full and true disclosure of the facts relating to MSHA's failure to inspect the beltlines in question on February 28, 1983.

I also recommend that this case be referred to the MSHA's office of special investigations for a determination of liability on the part of the operator or any its employees under sections 110(c) and/or (d) of the Act. I do this because I have probable cause to believe the operator's vice president in charge of operations knew or was aware of facts relating to the existence and gravity of these violations on February 28, 1983, and for some indefinite time prior thereto. This, ironically, is the same individual whom counsel represented would take disciplinary action against the mine foreman allegedly responsible for these violations. While I assume counsel was not aware of the extent of Mr. Jackson's involvement at the time this proposal was made, I cannot help but observe that if Mr. Jackson took the disciplinary action claimed, it must have been done with tongue-in-cheek.

Suffice it to say that after reviewing this matter at some length, I refused the proffered basis for settlement, namely, \$1,900, and suggested \$10,500. At the request of counsel, I remitted \$3,000 in return for a letter from the operator's vice president in charge of operations, setting forth the disciplinary action taken against those allegedly responsible for these violations. The letter was to be furnished in 10 days. When it was not forthcoming, I contacted counsel who said he would send it in immediately. After a further delay, all I received was the attached letter, not from Mr. Jackson, but from counsel.

It is time I terminated my consideration of this matter and let it pass into the hands of those with the necessary investigatory manpower and resources to complete the enforcement action. I shall, however, follow the sequel with interest.

Accordingly, it is ORDERED that the settlement approved at the prehearing/settlement conference of February 7, 1984, be, and hereby is CONFIRMED, and that the settlement amount agreed upon and paid, \$7,500, be allocated equally among the four violations found. It is FURTHER ORDERED that upon expiration of the time for own motion or other review by the Commission, the Commission take such action as it deems appropriate to refer this matter to the Assistant Secretary for Mine Health and Safety, Department of Labor for such action as he deems appropriate to initiate the two investigations called for.



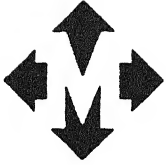
Joseph B. Kennedy
Administrative Law Judge

Distribution:

Nick Carter, Esq., Attorney at Law, Pontiki Coal Corporation,
181 N. Mill Street, No. 9, Lexington, KY 40507 (Certified Mail)

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Department of Labor, 280 U.S. Courthouse, 801 Broadway,
Nashville, TN 37203 (Certified Mail)

/fb



MAPCO INC.

Nick Carter
SENIOR ATTORNEY

Hon. Joseph B. Kennedy
Administrative Law Judge
Federal Mine Safety and Health Review Commission
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

Dear Judge Kennedy:

I am writing this letter at the request of Dennis Jackson, Vice President of Operations of Pontiki Coal Corporation.

Mr. Jackson and I personally conferenced with Ronnie Goble, Mine Foreman of Pontiki Coal Corporation, No. 2 Mine regarding the violations on March 1, 1983 concerning the beltline conditions and preshift-onshift inspections. At that conference Dennis Jackson expressed to Mr. Goble his extreme displeasure with those conditions. Additionally, Mr. Goble was made aware of the fact that if this situation reoccurs it may result in discipline under Pontiki's progressive disciplinary procedure which includes discharge.

Additionally, as a result of your ruling in this matter our entire procedure for handling violations has been changed. Briefly, all S & S violations are conferenced between the safety department and legal staff and if the legal staff, which is independent of mine management, determines that an individual is responsible for the violation they may conference with the individual and indicate that conference in that individual's personnel file. I think this will aid our safety efforts. It is because of the adoption of this policy and our desire to communicate it to you that this letter is arriving late.

I am having the draft in the amount of \$7500.00 sent under separate cover from Tulsa, Oklahoma.

Sincerely,

NWS Carter
Nick Carter

NC/jp

cc: Ronnie Goble-Personnel File
Dennis Jackson

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAR 30 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 80-293-M
Petitioner	:	A.C. No. 02-00973-05003
v.	:	
	:	Summit Mine
SCORIA PRODUCTS BRANCH,	:	
ULTRO, INC.,	:	
Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco, California,
for Petitioner;
(Respondent failed to appear).

Before: Judge Vail

STATEMENT OF THE CASE

This civil penalty proceeding was initiated by the Secretary of Labor ("Secretary") against Scoria Products Branch, Ultro, Inc., ("Scoria"), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for 8 alleged violations of certain mandatory safety standards. After issuance on May 20, 1980, by the Secretary, of his proposal for assessment of civil penalties, Urban Harenberg answered by letter dated May 29, 1980 denying the Summit Mine facility is a mine subject to the Federal Mine Health and Safety Act in that its products do not enter into or affect commerce.

The first Notice of Hearing issued in this case set the hearing date for February 22, 1982. It was continued at the request of the Secretary due to the United States Congress temporarily suspending expenditures of funds in enforcement of these particular cases. No objection was received from Scoria to this continuance. Congress revoked this suspension.

Pursuant to a second Notice of Hearing dated August 15, 1983, a hearing was convened on November 1, 1983, in Flagstaff, Arizona. The Secretary's Counsel appeared with his witnesses prepared to proceed. No one appeared on behalf of Scoria. Urban Harenberg had answered all prior correspondence and represented himself as owner and operator of Scoria. I attempted to locate a telephone number for Harenberg or Scoria in the Flagstaff telephone

directory and surrounding areas, but was unsuccessful. After a delay of thirty minutes, Counsel for the Secretary moved that he be allowed to present the evidence in his case, which was granted.

On November 7, 1983, an Order to Respondent was sent to Urban Harenberg (Scoria) to show cause why he should not be held in default. A reply was received from Harenberg on November 25, 1983, advising that he forgot the date of the hearing and stating that he was "74 years of age, the duration was too long, and I simply forgot."

I find that Scoria is in default of the Notice of Hearing in this case for failing to appear. Harenberg's admission that he simply forgot does not warrant setting a new hearing date in this case. He admitted receiving the notice and being in the area on the date set. I did not rely on some other person to search for his telephone number that morning, but rather did it myself. That I was unsuccessful in locating a listing is unfortunate; however, the fact remains that an effort was made. Also, the Secretary's Counsel and witness appeared at the time and on the date set, at considerable expense and time, as did the Administrative Law Judge for the Federal Mine Safety and Health Review Commission. These considerations persuade me that the reason for respondent's failure to attend is unjustified.

On July 11, 1979, MSHA inspector Virgil Wainscott inspected a mine called Harenberg Pit No. 1. It was a small cinder mining operation employing two men. One operated a front-end loader with the second employee working around a conveyor belt, screener, and hopper. This mine was located fourteen miles north of Flagstaff, Arizona. Inspector Wainscott issued the following citations in which he alleged eight violations of mandatory safety standards:

Citation No. 383422 was issued for a violation of 30 C.F.R. § 55.15-3 for failure by the miners to wear proper footwear. The proposed penalty in this case was \$16.00.

Citation No. 383423 was issued for a violation of 30 C.F.R. § 55.15-2 for failure by the miners to wear suitable hard hats. The proposed penalty in this case was \$18.00.

Citation No. 383424 was issued for a violation of 30 C.F.R. § 55.14-1 due to the return roller on the main stacker conveyor not being guarded. The proposed penalty in this case was \$28.00.

Citation No. 383425 was issued for a violation of 30 C.F.R. § 55.14-1 due to the V belt drive on the roll crusher not being guarded. The proposed penalty in this case was \$28.00.

Citation No. 383426 was issued for a violation of 30 C.F.R. § 55.12-28 for failure to have tested and recorded resistance reading of the plant ground system. The proposed penalty in this case was \$32.00.

Citation No. 383427 was issued for a violation of 30 C.F.R. § 55.14-1 due to the tail pulley on the main stacker conveyor being unguarded. The proposed penalty in this case was \$28.00.

Citation No. 383428 was issued for a violation of 30 C.F.R. § 55.14-1 due to the V belt on the generator being unguarded. The proposed penalty in this case was \$28.00.

Citation No. 383429 was issued for a violation of 30 C.F.R. § 55.12-32 due to a lack of a cover plate on the electric motor junction box for the return conveyor belt. The proposed penalty for this violation was \$24.00.

ISSUES

The issues in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding; and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

DISCUSSION

The evidence in this case shows that the plant cited here had been in operation for over a year prior to the regular inspection on July 11, 1979. Inspector Wainscott testified that Inspector Rayes Bender had been there in 1978 to explain the new Mine Safety and Health Act of 1977 to the operator. Also, Wainscott and his supervisor stopped three weeks prior to this regular inspection and talked to Ray Harenberg, son of Urban Harenberg, who was in charge of the mine. Again, an explanation of the Act and guarding of equipment was given to Harenberg (Transcript at 27, 28).

Wainscott testified that the miners required the protection of hard hats and safety shoes when working around the plant as they would be exposed to hazards from maintenance work and clean-up in that area (Transcript at 22, 23). A hazard existed from the tail pulley being unguarded, even though it was only two feet above ground, to anyone cleaning up around that area (Transcript at 23). No test had been made of the ground system at the plant as the operator had not obtained the equipment to do this. The obvious hazard here was from not knowing whether it worked and possible electrocution of a miner. Similar electrical hazard existed with the missing cover plate to the junction box (Transcript at 18).

I find from the testimony of Inspector Wainscott that the violations alleged in the 8 citations he issued did exist as described therein.

I further find that any defense raised by Urban Harenberg to jurisdiction is misplaced. The evidence shows that the product from this mine was sold for a commercial use. Whether the product crossed the State of Arizona line is not controlling as this issue has been considered and resolved in numerous cases concluding that sale in intrastate still "affects commerce." Marshall v. Meridith Mining Co. Inc., 483 F. Supp. 737 (1980), W.D. Penn., Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979).

Penalty

In regard to the mine operator cited in these 8 citations, the Secretary has indicated that his evidence shows that this is a small mining operation employing two miners. There is no prior history of violations. However, on two earlier visits, the mine inspectors had explained to the operator what the Act required for the health and safety of the miners employed.

It was also explained that the cited operator had sold the mine shortly after the inspection on July 11, 1979 and did not do the work to abate these citations. The new owner performed this work.

I find that the operator was negligent in allowing the violations contained in the above 8 citations to exist. Prior notice was given on two occasions relative to what the Act required. Apparently, these visits and explanations were ignored.

As to the gravity, I do not find this to be serious in these 8 citations. The evidence shows that the hazards described were not always present as described in the case of the front-end loader operator, not needing a hard hat or safety shoes until he was in the area of the plant and doing maintenance and clean-up. Also, the continuous ground system was found to be effective and not

a hazard. However, the requirement is that it must be tested and a record kept of this.

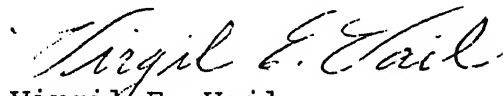
On the basis of the foregoing findings and conclusions, I conclude that the following penalties are reasonable and appropriate for the citations which have been affirmed in this case.

<u>Citation No.</u>	<u>Penalty</u>
383422	\$ 16.00
383423	18.00
383424	28.00
383425	28.00
383426	32.00
383427	28.00
383428	28.00
383429	24.00

Total \$ 202.00

ORDER

The respondent is ORDERED to pay civil penalties in the amounts shown above, totaling \$ 202.00 within forty (40) days of the date of this decision and order, and upon receipt by MSHA, this case is DISMISSED.


Virgil E. Vail
Administrative Law Judge

Distribution:

Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, 11071 Federal Building, P. O. Box 37017, San Francisco, California 94102 (Certified Mail)

Mr. Urban Harenberg, Scoria Products, 2212 North East Street, Flagstaff, Arizona 86001 (Certified Mail)

